

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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Jenkins v. Jenkins	54 N.C. App. 693	Appeal Dismissed 305 N.C. 396
Kaplan School Supply v. Henry Wurst, Inc.	56 N.C. App. 567	Denied, 306 N.C. 385
McLean v. Roadway Express	56 N.C. App. 451	Allowed, 306 N.C. 385
Peele v. Board of Education	56 N.C. App. 555	Denied, 306 N.C. 386
Propst Construction Co. v. Dept. of Transportation	56 N.C. App. 759	Allowed, 306 N.C. 386
Purdy v. Brown	56 N.C. App. 792	Allowed, 306 N.C. 386
Rhoads v. Bryant	56 N.C. App. 635	Denied, 306 N.C. 386
Roberts v. Durham County Hospital Corp.	56 N.C. App. 533	Allowed, 306 N.C. 387
Rutledge v. Tultex Corp.	56 N.C. App. 345	Allowed, 306 N.C. ---
Simmons v. C. W. Myers Trading Post	56 N.C. App. 549	Allowed, 306 N.C. 387
Simons v. Quick Stop Food Mart	56 N.C. App. 105	Allowed, 305 N.C. 587
Smith v. Dickinson	56 N.C. App. 814	Denied, 306 N.C. 387
State v. Andrews	56 N.C. App. 91	Denied, 305 N.C. 587 Appeal Dismissed



<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
State v. Black	56 N.C. App. 467	Denied, 305 N.C. 588
State v. Bowen	56 N.C. App. 210	Denied, 305 N.C. 588 Appeal Dismissed
State v. Brown	54 N.C. App. 693	Denied, 305 N.C. 396 Appeal Dismissed
State v. Butner	56 N.C. App. 642	Denied, 305 N.C. 588
State v. Chinn	47 N.C. App. 207	Denied, 305 N.C. 397
State v. Evans	56 N.C. App. 256	Denied, 305 N.C. 589
State v. Gray	56 N.C. App. 665	Denied, 306 N.C. 388
State v. Harrison	56 N.C. App. 368	Denied, 306 N.C. 388
State v. Hodgen	47 N.C. App. 329	Petition Dismissed 305 N.C. 397
State v. Howard	56 N.C. App. 41	Denied, 305 N.C. 305
State v. Huff	56 N.C. App. 721	Denied, 306 N.C. 389
State v. Jackson	56 N.C. App. 607	Denied, 306 N.C. 389
State v. Lay	56 N.C. App. 796	Denied, 306 N.C. 390 Appeal Dismissed
State v. Little	56 N.C. App. 765	Appeal Dismissed 306 N.C. 390
State v. Love	56 N.C. App. 814	Denied, 306 N.C. 390 Appeal Dismissed
State v. Lucas	56 N.C. App. 815	Denied, 306 N.C. 390
State v. Moore	54 N.C. App. 365	Denied, 305 N.C. 398
State v. Moore	56 N.C. App. 258	Denied, 306 N.C. 390 Appeal Dismissed
State v. Pevia	56 N.C. App. 384	Denied, 306 N.C. 391
State v. Pollock	56 N.C. App. 257	Denied, 305 N.C. 590 Appeal Dismissed
State v. Reynolds	56 N.C. App. 257	Denied, 305 N.C. 590
State v. Romero	56 N.C. App. 48	Denied, 306 N.C. 391
State v. Rush	56 N.C. App. 787	Denied, 306 N.C. 391
State v. Simmons	56 N.C. App. 34	Denied, 305 N.C. 591 Appeal Dismissed
State v. Surgeon	56 N.C. App. 632	Denied, 306 N.C. 391
State v. Shackelford	56 N.C. App. 815	Denied, 306 N.C. ---
State v. Thomas	52 N.C. App. 186	Denied, 305 N.C. 591

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
State v. Todd	56 N.C. App. 116	Denied, 305 N.C. 591
State v. Watson	51 N.C. App. 248	Denied, 306 N.C. 391
State v. Wells	54 N.C. App. 192	Denied, 306 N.C. 392
State v. White	54 N.C. App. 451	Denied, 306 N.C. 392
State v. Wilhite & Rankin	56 N.C. App. 467	Denied, 305 N.C. 591 Appeal Dismissed
State v. Woods	56 N.C. App. 193	Denied, 305 N.C. 592
State v. Woody	56 N.C. App. 467	Denied, 305 N.C. 592
State ex rel. Utilities Commission v. Public Service Company	56 N.C. App. 448	Allowed, 306 N.C. 392
Stone v. Martin	56 N.C. App. 473	Denied, 306 N.C. 392
Sullivan v. Smith	56 N.C. App. 525	Denied, 306 N.C. 392
Superscope, Inc. v. Kincaid	56 N.C. App. 673	Denied, 305 N.C. 592
Talaferro v. Wright	56 N.C. App. 643	Denied, 306 N.C. ---
Walters v. Walters	54 N.C. App. 545	Allowed, 305 N.C. 592
Whitener v. Whitener	56 N.C. App. 599	Denied, 306 N.C. 393





CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
**NORTH CAROLINA**  
AT  
**RALEIGH**

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DONALD C. CONNOR, SR. AND BETTY CONNOR v. ROYAL GLOBE INSURANCE COMPANY

No. 8127SC267

(Filed 16 February 1982)

**1. Rules of Civil Procedure §§ 8, 13— failure to reply to counterclaim—admission of material or relevant allegations**

When a defendant makes a counterclaim denominated as such and the plaintiff fails to make a reply, the *material* or *relevant* averments of the counterclaim are deemed admitted.

**2. Rules of Civil Procedure §§ 8, 13— failure to reply to counterclaim—allegations not deemed admitted**

In an action to recover under a fire insurance policy in which defendant insurer counterclaimed for an amount it had paid to the mortgagee, plaintiffs' failure to file a reply to the counterclaim did not constitute an admission of allegations in the counterclaim that plaintiffs violated conditions of the policy by burning the building, increasing the hazard and misrepresenting certain facts so as to defeat plaintiffs' right to recover under the policy where such allegations were not material or necessary to defendant's recovery because the parties had stipulated that defendant was entitled to a credit or judgment on its counterclaim for the amount it had paid the mortgagee regardless of any violation of the policy by plaintiffs. G.S. 1A-1, Rule 8(d).

**3. Evidence § 22.2— guilty pleas in district court—exclusion of evidence**

In an action to recover under a fire insurance policy on a building used as a private men's club, the trial court's exclusion of insured's testimony on cross-examination that he pleaded guilty in district court to operating an illegal gambling house at the club and operating a social club without an A.B.C. permit, if erroneous, was not prejudicial to defendant insurer where insured further explained that he entered the guilty pleas in district court without an attorney pursuant to a plea bargain agreement, that he appealed his cases for

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a trial *de novo* in the superior court because the State did not carry out its part of the plea bargain, that he retained an attorney to represent him in the superior court, and that all charges against him were dismissed in the superior court.

**4. Insurance § 136 — action on fire policy — sufficiency of evidence to support findings**

In an action to recover under a fire insurance policy in which defendant insurer alleged that the fire was deliberately set, the evidence was sufficient to support findings by the trial court that an S.B.I. agent saw fuel lines in the floor but could not say where they were and that a second S.B.I. agent couldn't recall seeing fuel lines in the floor but thinks he would remember them if they were there.

APPEAL by defendant from *Howell, Judge*. Judgment entered 4 December 1980 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 19 October 1981.

THE PLEADINGS

Plaintiffs instituted this action to recover on a fire insurance policy issued by the defendant. Plaintiffs alleged that a building covered by the policy had been destroyed by fire and that the defendant had unjustifiably refused to pay.

The defendant's responsive pleading was styled "Answer and Counterclaim." Defendant's Answer admitted issuance of the policy and admitted fire damage to the insured building, but denied liability. The defendant then set forth affirmative defenses in its Answer, alleging that certain conditions of the policy were violated in that one or both of the plaintiffs (1) deliberately burned the building or procured someone else to burn it; (2) increased the fire hazard by opening the building (a private men's club) to the public and allowing gambling and the sale of liquor and drugs on the premises; and (3) willfully concealed or misrepresented material facts with respect to the management of the building, the activities carried on in the building, and the origin of the fire. Finally, defendant asserted as a defense its claim for a setoff of \$19,573.66, an amount paid by the defendant to the plaintiffs' mortgagee.

In its counterclaim, the defendant set forth more details concerning its payment to the mortgagee, Home Savings and Loan Association. After re-alleging that the plaintiffs had violated the conditions of the policy by burning the building, by increasing the

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hazard, and by willfully misrepresenting material facts, defendant alleged that it had paid the outstanding balance of \$19,573.66 to Home Savings and Loan Association pursuant to the terms of the insurance policy<sup>1</sup> and had received a subrogation receipt, and that defendant was subrogated to the rights of Home Savings and Loan Association and was entitled to recover \$19,573.66 from the plaintiffs. The plaintiffs filed no reply to this counterclaim. Defendant subsequently moved for entry of default and default judgment based upon the plaintiffs' failure to reply, but no ruling was entered on this motion prior to the trial.

**EVIDENCE AT TRIAL**

The case was tried without a jury. Mr. Connor testified that he owned the building in Gaston County that was insured by the defendant; that the building was leased to Elijah Teal of Charlotte and was operated by Teal as a social club known as the Kings Mountain Men's Club (Club); that he received \$600 rent per month plus the profits from certain "game machines" that were on the premises; that the building and its contents were completely destroyed by fire during the early morning hours of 6 April 1979; and that the building had been raided by law enforcement officers on the night of 5 April 1979 about three or four hours before the fire. Mr. Connor admitted that he was quite frequently at the Club on Friday and Saturday nights, but he denied having anything to do with the operation of the club and denied being aware of any gambling, liquor sales or drug sales on the premises.

Plaintiffs also presented evidence that before the fire the value of the building was approximately \$150,000 and the value of

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**1. The insurance policy provides:**

Whenever the company shall pay the mortgagee (or trustee) any sum for loss under this policy, *and shall claim that, as to the mortgagor or owner, no liability therefor existed*, the Company shall to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest accrued and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of said mortgage's (or trustee's) claim. [Emphasis added.]

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its contents was \$57,283. The building was insured for \$80,000. The personal property was insured for \$25,000.

For defendant, a State Bureau of Investigation (S.B.I.) agent testified that he went to the Club six or seven times during February and March 1979 in an undercover capacity; that he saw Mr. Connor inside the Club at the entrance on each occasion; and that he observed gambling, the serving of alcohol, and drug transactions inside the Club. Defendant then called as witnesses three other S.B.I. agents who participated in an investigation of the fire. Their testimony tended to show that five samples were taken from the floor of the building, that chemical analysis revealed the samples to contain "a petroleum distillate in the boiling point range of number two fuel oil or heating oil," and that some of the cement floor of the building revealed spalling which indicated that intense heat had been concentrated there. In the opinion of one S.B.I. agent the fire at the building "had been set." The defendant also formally introduced certain allegations in its counterclaim.

#### JUDGMENT

Following the presentation of evidence, the trial court entered judgment, finding facts and drawing conclusions of law. The trial court ruled that the defendant did not prove that the fire had been deliberately set or that the plaintiffs violated any of the policy conditions. The trial court awarded plaintiffs \$25,000 for the personal property loss and \$80,000 for the building, diminished by \$19,573.66, the amount of defendant's counterclaim.

*Jones, Hewson & Woolard, by R. G. Spratt III, and H. C. Hewson, for defendant appellant.*

*Horn, West & Horn, by J. A. West, for plaintiff appellees.*

BECTON, Judge.

#### I

The principal issue on this appeal concerns the effect of the plaintiffs' failure to file a reply to the defendant's counterclaim. G.S. 1A-1, Rule 8(d) provides, "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the respon-



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sive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." G.S. 1A-1, Rule 7(a) provides that "[t]here shall be . . . a reply to a counterclaim denominated as such. . . ."

According to defendant, one paragraph of the counterclaim—the one that alleges that the plaintiffs violated the conditions of the policy by burning the building, by increasing the hazard, and by willfully misrepresenting material facts—includes allegations which, if taken as admitted, would defeat the plaintiffs' right to recover on the policy.

The trial court refused to take this paragraph as admitted, and we agree with the trial court. Before setting forth the bases for our decision, we issue this caveat: Litigants should comply strictly with our Rules. Because, and only because, we find that defendant was entitled to recover the \$19,573.66 it paid the mortgagee without reference to the counterclaim do we uphold the trial court.

Significantly, our Supreme Court in *Exum v. Boyles*, 272 N.C. 567, 579, 158 S.E. 2d 845, 855 (1968) said:

[i]t would be exceedingly technical to hold that, though the complaint . . . alleged facts giving rise to the doctrine of the last clear chance, the plaintiff may not receive the benefit of the doctrine . . . merely because . . . facts were alleged in the complaint rather than in a reply.

Indeed, because of our "general policy of proceeding to the merits of an action," *Johnson v. Johnson*, 14 N.C. App. 40, 43, 187 S.E. 2d 420, 422 (1972), when to do so would not violate the letter or spirit of our Rules, this Court has refused to adhere strictly to Rule 8(d) in the context of a plaintiff's failure to file a reply to a counterclaim in at least two cases.

In *Eubanks v. Insurance Co.*, 44 N.C. App. 224, 261 S.E. 2d 28 (1979), *disc. review denied* 299 N.C. 735, 267 S.E. 2d 661 (1980), we concluded that Rule 8(d) did not apply since the defendant had not filed a true counterclaim. "In its answer defendant captioned its allegations of false representations a 'counterclaim.' . . . However, we conclude that, in effect, defendant did nothing more than raise an affirmative defense to plaintiff's cause of action to

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which a reply was neither required nor permitted by G.S. 1A-1, Rule 7(a)." *Id.* at 229, 261 S.E. 2d at 31.

In *Johnson v. Johnson*, the trial court allowed the plaintiff to present evidence in defense of the defendant's counterclaim and then allowed the plaintiff to file a late reply conforming to the evidence already presented. This Court held "that the trial court was within its discretion in admitting plaintiff's evidence and allowing plaintiff to file a reply." 14 N.C. App. at 43, 187 S.E. 2d at 422. *See also Dyotherm Corp. v. Turbo Machine Co.*, 233 F. Supp. 119, 39 F. R. D. 370 (E. D. Pa. 1966).

[1] Rule 8(d) of the Federal Rules of Civil Procedure is identical to our 8(d), and commentators on the federal rules suggest one limitation upon the scope of Rule 8(d) which is not specified in the Rule. Professors Wright and Miller, in discussing the limits of Rule 8(d), write, "[a]n additional exception probably can be implied to the effect that Rule 8(d) only applies to 'material' or 'relevant' averments." 5 Wright and Miller, *Federal Practice and Procedure: Civil* § 1279, p. 354-355. We subscribe to that view, and we state the controlling proposition in this State clearly and succinctly: when a defendant makes a counterclaim denominated as such and the plaintiff fails to make a reply, the *material* or *relevant* averments of the counterclaim are deemed admitted.

[2] We hold that the averments in the counterclaim filed by defendant in this case were neither "material or relevant" nor essential in order for defendant to recover the \$19,573.66 it paid the mortgagee. Our reasoning follows.

This case was tried before a judge sitting as a jury. We are required to give deference to the trier of fact. In this context, the statements made before the presentation of evidence become significant. Presumably, Mr. Spratt, as counsel for the defendant, began the following colloquy, since it was he who answered the court's question:<sup>2</sup>

. . . .

"The final motion—the motion for entry of default and default judgment—I would say we would defer discussion of it at this time unless you would prefer to go ahead.

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2. Who began the colloquy is not as significant as what was said.

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"THE COURT: With respect to what?

"MR. SPRATT: The counterclaim in the case, Your Honor.

"THE COURT: All right.

"MR. HORN: Please the Court, it is my contention that the answer to the first—my issue in this case—against me—that the counterclaim's automatically in your behalf, is that correct?

"MR. SPRATT: That's what you told me.

"MR. HORN: And that's the way I see it, and it's based on the fact that under the insurance policy, they paid to the savings and loan association some \$19,000. We're not entitled to recover on the primary suit, so it's automatic that they recover that from the defendants—the plaintiffs, and that's the matter in that suit.

"THE COURT: All right, and how many witnesses do you anticipate?

People are often surprised when they see what they have said in print. One could conclude, reading the colloquy set out above, that Mr. Horn was suggesting that the plaintiffs were not entitled to recover on their claims, and that the defendant was automatically entitled to recover from the plaintiffs. That would be no more a strained interpretation than the one which follows with our addition of the bracketed portions:

"Please the Court, it is my contention that [if] the answer to the first—[issue in my case] . . . [is] against me—[then] the counterclaim [is] automatically in . . . [the defendant's] behalf[.] [I]s that correct?

. . .

"[If] we're not entitled to recover on the primary suit, [then] it's automatic that they [the defendant] recover . . . from . . . the plaintiffs. . . ."

From the foregoing, two things seem immediately apparent. First, defendant did not aggressively or vigorously pursue at trial what has now become the focal point of its appeal—the plaintiffs' failure to file a reply. The parties agreed to "*defer discussion*" of

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the matter. Indeed, the trial proceeded with defendant seeking primarily to establish a valid, meritorious defense. Scant reference was made to plaintiffs' failure to file a reply. Second, although Mr. Horn made a stipulation in rather confusing language, the fact that Mr. Spratt said "[t]hat's what you told me," and the fact that the court proceeded suggest that the court and the attorneys on both sides knew that Mr. Horn meant the following:

Either way the main case goes, the insurance company is entitled either to a credit or a judgment on its counterclaim for the amount it paid to the mortgagee, because if the plaintiff recovers, the insurance company is entitled to an offset for the amount paid to the mortgagee and if the plaintiff does not recover, the insurance company is entitled to a judgment against plaintiff for the amount it paid the mortgagee.

The fact that the Court ultimately awarded plaintiffs \$105,000.00, the full amount of the policy, diminished by \$19,573.66, the amount of defendant's counterclaim, supports this construction. Had the court not allowed the offset, defendant would have paid \$19,573.66 more than it contracted to do.

A review of the allegations and the prayer for relief in the Answer and Counterclaim is necessary. After setting forth general allegations denying liability because plaintiffs had violated conditions of the policy, defendant set forth its affirmative defenses, to wit: A Third Defense that plaintiffs deliberately burned their property or caused it to be burned; a Fourth Defense that plaintiffs maliciously burned the building with the intent to defraud the defendant; a Fifth Defense that plaintiffs increased the hazard by permitting the sale of intoxicating beverages on the premises, allowed gambling, cooking, and sale of drugs, and did not restrict the club to members only; and a Sixth Defense that plaintiffs willfully concealed or misrepresented material facts and circumstances concerning the insurance.

After setting forth its affirmative defenses, the defendant, in a section of its answer styled "Counterclaim," re-alleged, in a single paragraph and in summary fashion, the separate allegations contained in its Third, Fourth, Fifth and Sixth Defenses. After setting forth the basis of its counterclaim in eleven numbered paragraphs, defendant in Paragraph Twelve stated,

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"As a result of the violations of the conditions of the . . . policy by the plaintiffs, as hereinbefore set forth, the defendant is entitled to recover from the plaintiff the sum of \$19,573.66."

Immediately following Paragraph Twelve of the counterclaim is the prayer for relief, which states:

WHEREFORE, the Defendant, having answered the complaint of the plaintiffs, prays that:

1. The plaintiffs have and recover nothing of it, and that the plaintiffs' complaint be dismissed; and
2. It have and recover of the plaintiffs on its counterclaim the sum of \$19,573.66. . . .

In view of Paragraph Twelve of the counterclaim and the limited prayer for relief relating to the counterclaim, we cannot say that the trial court abused its discretion by concluding that the allegations in Paragraph Eight of the counterclaim were not necessary to grant defendant the relief it sought—\$19,573.66. As we indicated, plaintiffs had already stipulated in open court that defendant was entitled, in all events, to recover that amount, and the defendant acknowledged as much in the colloquy between the court and the attorneys for both parties. Moreover, defendant had taken this position in its Answer. In its Seventh Defense, defendant said:

In the event that the defendant is liable to the plaintiff, which is denied, then the defendant is entitled to a set-off or credit of \$19,573.66, which the defendant has paid to the plaintiffs' mortgagee, Home Savings and Loan Association, under the policy number YN 35-66-37, said payment being required under the policy *regardless of any violations of the policy conditions by the plaintiffs*. [Emphasis added.]

On the peculiar facts of this case, all defendant ever sought was \$19,573.66, either by way of set-off or by way of relief on its counterclaim. Consequently, we believe Rules 7 and 8 of the North Carolina Rules of Civil Procedure should be considered in their entirety.

Applying the rules to the defendant's Answer and Counterclaim, plaintiffs are deemed to have denied defendant's affirmative defenses since the second sentence of Rule 8(d) provides

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that averments in a pleading to which no response is allowed are deemed denied. The first sentence of Rule 8(d) provides that averments in a pleading to which responsive pleading is required are deemed admitted if no responsive pleading is filed. Ordinarily, the failure to file a reply to a counterclaim would require that the allegations in the counterclaim be admitted. However, on the facts of this case, this rule should not apply. Here, the allegations in defendant's counterclaim that plaintiffs burned the building in violation of the terms of the insurance policy were neither material nor necessary to the defendant's recovery. This is so because the parties had stipulated before trial that the defendant was entitled to a set-off or credit regardless of any violation of the policy by the plaintiffs. In essence, the defendant's counterclaim was not necessary for it to recover the \$19,573.66 it paid the mortgagee. Since we view the counterclaim as adding nothing to the defendant's claim for the \$19,573.66, we reject the defendant's argument that its shorthand version of its defenses, set forth in Paragraph 8 of its counterclaim also established a defense to plaintiffs' claim as well. More specifically, we reject defendant's argument that since no reply was filed to the counterclaim, plaintiffs admitted the allegations that they burned their own building and that because of this admission, plaintiffs could not collect under the terms of the policy.

In this context, we fail to see how the trial court abused its discretion in concluding (1) that the allegations in the counterclaim that plaintiffs violated the terms of the policy were not necessary in order for plaintiffs to recover the \$19,573.66 it sought in the counterclaim; and (2) that an anomaly would result in this case, if the allegations in the counterclaim were deemed admitted by the first sentence of Rule 8(d) while the same allegations set forth as affirmative defenses are deemed denied by the second sentence of Rule 8(d). The trial court's position gives full application to both sentences in Rule 8(d), and it is the only stance that does.

## II

[3] Defendant's second assignment of error raises a point of evidence. Mr. Connor was arrested during the 5 April 1979 raid on the Club. During cross examination, Mr. Connor was asked whether on 29 May 1979 he had pleaded guilty in district court to

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four counts of operating an illegal gambling house at the Club and four counts of operating a social club without an A.B.C. permit. Objections were sustained. The record suggests that Mr. Connor appeared in district court without an attorney and entered guilty pleas pursuant to a plea bargain; that he subsequently appealed to superior court and retained an attorney to represent him; and that all charges were dismissed in superior court. Defendant argues that the trial judge erred by refusing to allow the 29 May 1979 guilty pleas in evidence.

"A plea of guilty on a former trial may be admitted against the defendant as an admission. . . ." 2 Stansbury's N.C. Evidence § 177 (Brandis rev. 1973) at p. 44. In *Teachey v. Woolard*, 16 N.C. App. 249, 252, 191 S.E. 2d 903, 906, cert. denied 282 N.C. 430, 192 S.E. 2d 840 (1972), this Court said: [e]vidence that a defendant entered a plea of guilty to a criminal charge arising out of an automobile accident is generally admissible in a civil action for damages arising out of the same accident, although it is not conclusive and may be explained. *Grant v. Shadrick*, 260 N.C. 674, 133 S.E. 2d 457 (1963)." See also *Boone v. Fuller*, 30 N.C. App. 107, 226 S.E. 2d 191 (1976). A prior plea of guilty may not be used for any purpose when it is determined that the plea was not knowingly and understandingly entered, *State v. Alford*, 274 N.C. 125, 133-34, 161 S.E. 2d 575, 581 (1968), or when the plea was entered at a time when the defendant was denied his right to counsel, *White v. Maryland*, 373 U.S. 59, 10 L.Ed. 2d 193, 83 S.Ct. 1050 (1963). No such irregularity appears with respect to Mr. Connor's guilty pleas. Mr. Connor did not deny entering the pleas knowingly and understandingly. He explained that he decided to appeal his cases only when the State failed to carry out its part of the plea bargain. Mr. Connor did not show that he was denied his right to counsel at the time of the guilty pleas. He testified that he did not have an attorney, but he did not claim indigency, and he, in fact, retained an attorney to represent him in superior court. The only grounds for questioning admissibility of Mr. Connor's guilty pleas arises from his appeal for a trial *de novo* and the subsequent dismissal of the charges. In 2 Stansbury's N.C. Evidence § 177, n. 63 we find the following:

At present, an appeal from District Court to Superior Court entitles the criminal defendant to trial *de novo* even if he pleaded guilty in District Court. "The judgment appealed

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from is completely annulled and is not thereafter available for any purpose." *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied*, 403 U.S. 940. . . . Clearly the language of the *Sparrow* opinion prevents evidentiary use of the guilty plea at the *de novo* trial, at least as substantive evidence and very likely for impeaching defendant as a witness. Whether evidence of the District Court plea is admissible in a civil case, *quaere*?

In other jurisdictions, it has been held that the withdrawal of a guilty plea and the subsequent dismissal of the charges does not affect admissibility of the plea as an admission against interest in a subsequent civil action involving the same facts. *Vaughn v. Jonas*, 31 Cal. 2d 586, 191 P. 2d 432 (1948); *Morrissey v. Powell*, 304 Mass. 268, 23 N.E. 2d 411 (1939); *see generally* 29 Am. Jur. 2d, Evidence § 701 (1967); Annot., 18 A.L.R. 2d 1287 (1951).

Assuming that the trial court should have admitted the evidence of Mr. Connor's guilty pleas in this case, we can find no prejudicial error in their exclusion. Defendant argues that the pleas would have tended to show that Mr. Connor helped operate the Club and that the hazard of fire was increased by the conduct of gambling and illegal liquor sales on the premises.

Defendant also argues that Mr. Connor's guilty pleas would have served to impeach his credibility. However, we find the value of the evidence to be minimal in light of Mr. Connor's explanation of his pleas and the subsequent dismissal of the charges. This assignment of error is overruled.

### III

[4] By his final assignment of error, defendant essentially contends that the following findings of fact were not supported by the evidence:

14. That [the S.B.I. agent (Lane)] who gather [sic] samples from the debris for analysis was unable to state where the fuel lines hereinabove were located with respect to the samples. . . .

. . . .

16. That agent Hatcher of the S.B.I. examined the building, but does not recall the fuel lines or copper tubing



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hereinabove described which was observed by [Agent Lane], but did observe a scalding on concrete floor and obtained samples from this area. . . .

According to the defendant, the trial court relied on this "erroneous finding of fact in concluding that the defendant had failed to prove that the fire had been deliberately set." We disagree. Relevant portions of S.B.I. Agent Lane's cross, redirect and re-cross examination testimony are set out below:

[CROSS EXAMINATION]

I believe the building was heated by a ceiling-type furnace. I believe it was an oil furnace. As for whether there were copper fuel lines running through the ceiling, they were all down at that time and I saw them.

[REDIRECT EXAMINATION]

I can't specifically recall the location of the fuel lines in the building other than the back kitchen area where the furnace was located. I did not see any fuel oil lines in the vicinity where I took my samples.

[RE-CROSS EXAMINATION]

I can't recall specifically seeing evidence that copper fuel lines ran to the furnace in the back of the dance hall area. I'm not going to deny they were there. As for whether I'm going to deny where they were in that room, my answer is "no."

S.B.I. agent Hatcher, testifying for the defendant, stated:

[DIRECT EXAMINATION]

The interior of the building was completely involved by fire. The contents were burned, the roof had burned, and fallen into the building. The Ceiltex on the ceiling had come loose and fallen on the floor in the dancing area of the building where the tables were located . . . We proceeded to examine this floor underneath the Ceiltex, and it was in this area where Mr. Lane and I obtained samples. I do not remember seeing any copper tubing in the area where these samples were taken. . . .

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**[CROSS EXAMINATION]**

I do not recall moving any fuel lines to find the spalling spots. If there had been any fuel lines there, I think I would remember them.

From this testimony, the trial court, sitting as a jury, could, but was not compelled to, have found that agent Lane saw fuel lines in the floor but could not say where they were and that Agent Hatcher couldn't recall seeing fuel lines in the floor but thinks he would remember them if they were there. This assignment of error is overruled.

For the foregoing reasons, the judgment of the trial court is Affirmed.

Chief Judge MORRIS and Judge ARNOLD concur.

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WALTER HYATT, EMPLOYEE, PLAINTIFF v. WAVERLY MILLS, EMPLOYER, AND  
TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS.

No. 8110IC781

(Filed 16 February 1982)

**1. Master and Servant §§ 68, 69.1— evidence supporting finding of total disability**

The Commission's findings as to plaintiff's total disability, as these terms are used in G.S. 97-2(9) and G.S. 97-55, were supported by the evidence. A doctor's testimony that plaintiff was totally disabled as of the date of trial supported the Commission's finding that plaintiff was permanently disabled as of the date of his retirement 18 months earlier, and the doctor's statement that plaintiff was disabled for "anything except sedentary occupation in a very clean environment" also supported the Commission's finding as plaintiff's age, education, training, and work experience did not suggest a reasonable probability that he could obtain employment in anything but a manual labor environment.

**2. Master and Servant § 69.2— onset of non-work-related diseases following work-related disablement—no affect in compensation**

A doctor's testimony that he had diagnosed angina in plaintiff 11 months after plaintiff became disabled for work did not necessarily show that plaintiff's disability was due in part to angina. The onset of non-work-related diseases following work-related disablement does not affect in any way plaintiff's entitlement to compensation as of the date of his work-related injury.

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**Hyatt v. Waverly Mills**

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**3. Master and Servant § 68— finding plaintiff's disability caused by occupation—supported by evidence—medical evidence sufficiently definite**

Based upon a doctor's diagnosis that plaintiff's lung dysfunction was probably caused by exposure to cotton dust in plaintiff's employment, and his determination that if there were other possible contributing agents or causes such other causes could not be quantified, the Commission was justified in finding the occupational exposure to be the sole cause of injury.

**4. Master and Servant § 71— computation of "average weekly wages"—methodology used fair**

The Commission's methodology used in determining plaintiff's "average weekly wages," as that term is used in G.S. 97-2(5), was fair and just to both parties where the Commission considered plaintiff's wages during a period when plaintiff was able to maintain steady employment as well as the 52 week period prior to the date of plaintiff's injury when he worked only a number of short days due to his weakened condition.

**5. Master and Servant § 95.1—validity of appeal from Commission—no error in denial of penalty award**

The Commission did not err in denying plaintiff's motion to dismiss defendant's appeal for failure to timely perfect it and to award plaintiff additional compensation for defendants' failure to pay plaintiff's award when due under G.S. 97-18 where defendants filed a "notice of protective appeal" which complied with one rule of the Commission but failed to comply with another rule of the Commission. The Commission waived the application of the rule with which defendants failed to comply, and the exercise of its discretion in such matters, absent abuse, is not reviewable by the courts.

APPEAL by defendants and cross-appeal by plaintiff from Industrial Commission. Opinion and award entered 23 February 1981. Heard in the Court of appeals 11 December 1981.

Plaintiff's claim for compensation for total disability due to occupational disease (byssinosis) was allowed by Deputy Commissioner Shuping. On appeal, the Full Commission adopted and affirmed the opinion and award. Defendants appealed from the award. Plaintiff cross-appealed from the denial of his motion for a ten percent increase in the award for defendants' failure to pay the award when due and from the Commission's failure to dismiss defendants' appeal.

The evidence upon which the award was made consisted of the testimony of plaintiff, Mr. Tom Murray, Personnel Administrator for defendant Waverly Mills, Donald Woolfolk, M.D. and Charles D. Williams, Jr., M.D.

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Plaintiff testified that he was born on 15 August 1906, has no formal education, can neither read nor write, and is not licensed to operate a motor vehicle. Plaintiff began working in cotton mills in 1928 or 1929 and continued in that employment on a regular and continuing basis until he retired in 1968. During the years between 1928-29 and 1968, plaintiff worked in an environment containing a significant amount of cotton dust, which was at times very dusty. In 1953, plaintiff began to notice difficulty in breathing, fatigue, and chest pain. Plaintiff's symptoms were more severe at work. His symptoms gradually became more severe until, at age 62, he voluntarily retired from work in 1968. Plaintiff returned to work in 1976, worked for about nine months and then quit. He again returned to work on 21 February 1978, worked until 6 May 1978, and then stopped because his physician, Dr. Vinson, advised him not to work anymore. Plaintiff was first treated by Dr. Vinson in about 1963, for bronchitis and emphysema. Plaintiff started smoking cigarettes in 1960 or 1965, smoking between half a pack and a pack per day. He stopped smoking in the early months of 1979.

Dr. Williams testified that he examined plaintiff and took plaintiff's history on 29 May 1978. Dr. Williams' examination and test were reduced to a ten page report. In Dr. Williams' opinion, plaintiff is disabled for anything except sedentary occupation in a very clean environment and plaintiff's condition is not significantly reversible. Dr. Williams' diagnoses were that plaintiff had pulmonary emphysema, chronic bronchitis, byssinosis, generalized arteriosclerosis, suspected chronic prostatitis, obesity, post-operative bilateral inguinal herniorrhaphy, and possible diabetes mellitus. Plaintiff's lung condition is his primary problem and the primary reason for his disability. It was Dr. Williams' opinion that plaintiff's lung problems were probably caused by exposure to cotton dust. Dr. Williams stated that plaintiff's lung problems could or might have been causally related to cigarette smoking, but it was not possible to quantitate the relative contribution of the smoking and cotton dust factors.

Dr. Woolfolk first saw plaintiff in April of 1979, when he hospitalized plaintiff for unstable angina. Dr. Woolfolk also took plaintiff's history and examined him in relation to plaintiff's lung problems. Dr. Woolfolk stated that plaintiff was disabled to engage in work for gainful wages; that plaintiff's chronic lung

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disease could have resulted in plaintiff's disability; that plaintiff's lung disease could be either byssinosis or emphysema, but that due to plaintiff's history of industrial exposure, emphysema was less likely; and that plaintiff's angina played a significant role in his present disability.

Mr. Murray testified as to plaintiff's wages and working conditions at Waverly Mills.

Based upon the stipulations of the parties and the evidence adduced at the hearings, Deputy Commissioner Shuping found plaintiff to be permanently and totally disabled as a result of chronic obstructive lung disease as of the date of plaintiff's retirement from work on 6 May 1978, and found that plaintiff's lung condition was due in significant part to byssinosis contracted by exposure to cotton dust during his employment in the textile industry. Plaintiff's average weekly wage was \$106.40. Commissioner Shuping awarded plaintiff the sum of \$70.94 per week from 6 May 1978, to continue during plaintiff's lifetime, a lump sum to be paid for the period between 6 May 1978 and the date of the award. The award was entered on 2 July 1980. On 4 September 1980, plaintiff filed a motion alleging that defendants had not perfected an appeal; that they had failed to pay plaintiff's award when due; and that plaintiff was entitled to an additional payment of ten percent of those installments not paid when due. Plaintiff moved to dismiss defendants' appeal. The Full Commission denied both motions, and the matter was subsequently heard on appeal by the Full Commission, which adopted and affirmed Commissioner Shuping's order and award. Defendants appealed and plaintiff cross-appealed.

*Hassell & Hudson, by Robin E. Hudson, for plaintiff-appellee.*

*Gene Collinson Smith, for defendant-appellants.*

WELLS, Judge.

[1] In their first and third assignments of error, defendants contend that the Commission erred in finding that plaintiff is permanently and totally disabled as a result of chronic obstructive lung disease which plaintiff contracted as a result of his exposure to cotton dust during his employment as a textile worker. Defendants' argument takes two tacks: one, that the evidence does not

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support a finding of total disability; and two, that the evidence does not support a finding that plaintiff's disability was caused solely by his exposure to cotton dust in his employment. The standard of review of such findings by the Commission is well established. We quote from the opinion of our Supreme Court in *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982).

Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding of fact. *Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980); *Inscoc v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977); *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965); *Rice v. Chair Co.*, 238 N.C. 121, 76 S.E. 2d 311 (1953); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). The appellate court does not retry the facts. It merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact. *Moses v. Bartholomew*, 238 N.C. 714, 78 S.E. 2d 923 (1953).

See also *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981); *Harrell v. J. P. Stevens & Co., Inc.*, 54 N.C. App. 582, 284 S.E. 2d 343 (1981). Defendants' argument as to plaintiff's degree of disability rests entirely on Dr. Woolfolk's statement that plaintiff was totally disabled "as of now" and Dr. Williams' statement that plaintiff was disabled for "anything except sedentary occupation in a very clean environment". The Commission found that plaintiff was permanently disabled as of the date of his retirement on 6 May 1978. Dr. Woolfolk's testimony that plaintiff was totally disabled as of the date of his testimony on 10 October 1979, eighteen months after plaintiff's retirement for disability, supports and enforces the Commission's findings and does not detract from or contradict them. As for Dr. Williams' evaluation of plaintiff's ability to work only at sedentary jobs in a very clean environment, such testimony must be evaluated in the light of plaintiff's education, training, and employment history. The question is what effect the disabling disease has had upon this particular plaintiff. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d

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804 (1972). Plaintiff's age, education, training, and work experience do not suggest a reasonable probability that he could obtain employment in anything but a manual labor environment, since that is all he has ever done. *See Little*, supra. The Commission's findings as to his total disability, as these terms are used in our Workers' Compensation Act, G.S. 97-2(9) and G.S. 97-55, are clearly and amply supported by the evidence. *Little*, supra. *See Anderson v. Smyre Mfg. Co.*, 54 N.C. App. 337, 283 S.E. 2d 433 (1981).

[2] Defendants also argue that the evidence shows that plaintiff's disability was due in part to angina, pointing to Dr. Woolfolk's testimony. Dr. Woolfolk did not examine plaintiff and diagnose angina until 14 April 1979, almost eleven months after plaintiff became disabled for work. Defendants' argument is without merit. The injury resulting in disability due to a compensable disease occurs when the claimant becomes disabled. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). The onset of other non-work-related diseases or infirmities following the work-related injury, i.e., the work-related disablement, does not affect in any way plaintiff's entitlement to compensation as of the date of his work-related injury.

[3] Next, defendants argue that the evidence does not support a finding that the sole cause of plaintiff's disability was his occupational exposure to cotton dust and that the medical evidence before the Commission was not sufficiently definite on the cause of plaintiff's disability to permit effective appellate review. In support of this argument, defendants cite our Supreme Court's order in *Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980). We recognize that the court's order in *Morrison*, supra, and its subsequent opinion in *Morrison*, reported at 304 N.C. 1, 282 S.E. 2d 458 (1981) establish the standards by which we must resolve this issue. It is thus appropriate that we review the history of and the issue involved in *Morrison* in some detail. *Morrison* arrived at this court in the context of an appeal by plaintiff from an opinion and award in which the Industrial Commission, though finding plaintiff to be totally and permanently disabled, awarded her only partial compensation on the grounds that the medical evidence in the record showed that her total disability was due in part to non-occupational diseases or infirmities. In a

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two to one decision<sup>1</sup> we held that the Commission was without authority to apportion plaintiff's disability where the evidence showed that her occupational disease was the precipitating cause of her inability to work. On appeal, our Supreme Court issued its 1980 order, *supra*, remanding the case directly to the Commission for further proceedings. In its order, the court stated that the medical evidence before the Commission was not sufficiently definite on the cause of plaintiff's disability to permit effective appellate review. We quote the statements we believe to be most pertinent to the issue now before us.

As we read the medical testimony, the physicians never addressed the crucial medical question of the interrelations, if any, between the cotton dust exposure and claimant's other infirmities such as her bronchitis, upper respiratory infection, sinusitis, phlebitis, and diabetes. In order for this Court to determine if the Commission's findings and conclusions are supported by the evidence, the record, through medical testimony, must clearly show: (1) what percentage, if any, of plaintiff's disablement, i.e., incapacity to earn wages, results from an occupational disease; (2) what percentage, if any, of plaintiff's disablement results from diseases or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease; and (3) what percentage, if any, of plaintiff's disablement is due to diseases or infirmities unrelated to plaintiff's occupation which were *not* accelerated or aggravated by plaintiff's occupational disease.

On remand, the Commission took additional medical evidence, re-addressing the questions relating to the causes of Mrs. Morrison's disability. Following the hearing on remand, the Commission made additional findings of fact and entered an award for the same degree of partial disability: 55 percent, which it had originally found. In its 1981 opinion, *supra*, the Supreme Court affirmed, holding that the medical evidence adduced at the hearing on remand clearly supported apportionment of only a part of Mrs. Morrison's disability to her occupational disease. In its opinion, the court stated the rule in such cases as follows:

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1. Reported at 47 N.C. App. 50, 266 S.E. 2d 741 (1980).



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What, then, must a plaintiff show to be entitled to compensation for disablement resulting from an occupational disease covered by G.S. 97-53(13)? The answer is: She must establish (1) that her disablement *results from an occupational disease* encompassed by G.S. 97-53(13), *i.e.*, an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement *resulting from said occupational disease, i.e.*, whether she is totally or partially disabled *as a result of the disease*. If the disablement resulting from the occupational disease is total, the claimant is entitled to compensation as provided in G.S. 97-29 for total disability. If the disablement resulting from the occupational disease is partial, the claimant is entitled to compensation as provided in G.S. 97-30 for partial disability. To be compensable under the Workers' Compensation Act, an injury must result from an accident arising out of and in the course of the employment. G.S. 97-2(6). Claimant has the burden of showing such injury. (Citation omitted.) That means, in occupational disease cases, that disablement of an employee resulting from an occupational disease which arises out of and in the course of the employment, G.S. 97-52 and G.S. 97-2(6), is compensable and claimant has the burden of proof "to show not only . . . disability, but also its degree." (Citation omitted.)

We find that plaintiff's evidence in this case meets the requirements of *Morrison*, *supra*. The testimony of both Dr. Williams and Dr. Woolfolk established plaintiff's lung disease as the cause of his disability. The medical evidence clearly supports the Commission's finding that plaintiff's lung disease was the cause of his disability and that his lung disease was caused by his exposure to cotton dust in his employment. Plaintiff's own testimony describing the physical manifestations of his disability: shortness of breath, inability to walk or remain ambulatory for more than short distances, and inability to exert himself more than minimally due to breathing difficulties, when taken together with the medical testimony, clearly support the Commission's finding that plaintiff's disability was due to chronic obstructive

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lung disease. Defendant argues, nevertheless, that because the medical evidence shows that plaintiff's lung disease was of three types: emphysema, chronic bronchitis, and byssinosis, such evidence requires apportionment of plaintiff's lung dysfunction to the degree it may have been caused by non-occupational factors. Dr. Williams addressed this issue directly. He stated on direct examination that it was probable that plaintiff's lung condition was caused by exposure to cotton dust. After discussing the symptomatology of emphysema, chronic bronchitis, and byssinosis, Dr. Williams testified on cross-examination:

I indicate in my comments that "it is not possible to make any medical statement as to the percentage of pulmonary dysfunction resulting from these various etiological agents." What I am saying, I can't assign any percentage of his impairment to any one cause.

Thus, the issue of causation was clearly addressed. Under such circumstances and in view of such evidence, it is for the Commission as the trier of facts to weigh the evidence in the case and to make findings based on that evidence. We do not believe that the principles laid down in *Morrison* require medical witnesses to do any more than deal with the symptoms and history of the patient under treatment or examination. Based on Dr. Williams' diagnosis that plaintiff's lung dysfunction was probably caused by exposure to cotton dust in plaintiff's employment, and his determination that if there were other possible contributing agents or causes, such other causes could not be quantified, the Commission was justified in finding the occupational exposure to be the sole cause of injury. See *Anderson v. Smyre Mfg. Co.*, supra. Compare *Walston v. Burlington Industries*, supra and *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). We therefore reject defendants' argument and overrule these assignments.

[4] Defendant also contends that the Commission erred in the manner in which it established plaintiff's average weekly wage. The controlling statute, G.S. 97-2(5), provides that:

"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceeding the date of the injury, . . . divided by 52. . . . Where the employment prior to the injury extend-

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ed over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed: provided results just and fair to both parties will be thereby obtained.

During the 52 weeks immediately preceding the date of plaintiff's injury—6 May 1978—plaintiff worked only during the period from 21 February to 6 May, a total of approximately 12 weeks. Due to his weakened condition, during that short period plaintiff worked a number of short days and earned only \$748.20, for an average of about \$62.50 per week by a weekly division computation. Due to the circumstances, the Commission considered plaintiff's earnings at Waverly Mills during the period between 7 September 1976 and 6 May 1977, when plaintiff was able to maintain steady employment. The Commission found an average weekly wage based on plaintiff's earnings from both of these periods of employment. We find that the Commission's methodology fairly approximated plaintiff's "average weekly wages", as that term is used in the statute and was fair and just to both parties. This assignment is overruled.

[5] Plaintiff has cross-appealed and assigned as error the Commission's failure to dismiss defendant's appeal and its failure to award plaintiff additional compensation for defendant's failure to pay plaintiff's award when due under G.S. 97-18.

The Commission was not in error in denying plaintiff's motion to dismiss defendant's appeal. The chronology of events is as follows. Deputy Commissioner Shuping's order was entered 2 July 1980. On 14 July 1980, defendants forwarded a letter to the Commission, the pertinent portions of which are:

Please take this letter as our Notice of Protective Appeal in the above styled matter, to the Opinion and Award by Lawrence B. Shuping, Jr. filed on July 2, 1980.

When the transcript has been prepared in this matter please forward it to this address.

Defendant did not provide plaintiff with a copy of the letter. On 4 September 1980, plaintiff filed a motion pursuant to the provisions of G.S. 97-18 for a penalty for defendant's failure to pay plaintiff's award when due, also alleging that defendants had not

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filed timely notice perfecting their appeal. On 5 September 1980, defendants filed an answer to plaintiff's motion, praying that plaintiff's motion be dismissed. That answer was served on plaintiff. On 19 September 1980 the Commission entered an order noting the foregoing events and delayed ruling on plaintiff's motions. On 24 September 1980 plaintiff filed a motion to dismiss defendant's appeal, alleging that defendants had never filed a notice of appeal or notice of intent to perfect their "protective" appeal. In its final order, the Commission found that defendants' appeal was valid and denied plaintiff's motion for a penalty. The governing statute is G.S. 97-18, which requires no particular form or content for the lodging of an appeal. G.S. 97-85 provides: "If application is made . . . within 15 days from the date when notice of the award shall have been given, the full (sic) Commission shall review the award. . .". Neither of these sections of the statute requires that an application for appeal be served upon or provided to other parties. Rule XXI of the Rules of the Industrial Commission provides in pertinent part as follows:

1. A letter expressing wish to appeal shall be considered notice of appeal to the Full Commission within the meaning of Section 85 of the Act.

2. Upon receipt of notice of appeal, the Commission will supply to the appellant proper form upon which he must state the particular grounds for his appeal. This form must be filed with the Commission, copy to appellee, within ten (10) days of appellant's receipt of transcript of the record, unless the use of such forms shall, in the discretion of the Commission, be waived.

3. Particular grounds for appeal not set forth in the application for review shall be deemed to be abandoned and argument thereon shall not be heard before the Full Commission. A nonappealing party is not required to file conditional assignments of error in order to preserve his rights for possible further appeals.

Rule XXI-1a, effective 1 February 1979, in its entirety is as follows:

Appellant shall, upon giving notice of appeal to the Full Commission, state in writing to the Commission that he

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believes there are good grounds for the appeal, shall list grounds of the appeal, and shall state that he has served copy of the notice of appeal and copy of the grounds of appeal on the appellee. Appellant is not limited to those listed grounds of appeal.

It is clear that while defendants may have met the provisions of Rule XXI, they clearly did not comply with Rule XXI-1a.<sup>2</sup> It would also seem clear, however, that the Commission deemed defendant's letter of 14 July 1980 to be an application for review under G.S. 97-85 and that the Commission waived the application of Rule XXI-1a to defendants' appeal in this case. The Commission has discretionary authority to waive its rules where such action does not controvert the provisions of the statute. Rule XXIV. The exercise of its discretion in such matters is not reviewable by the courts, absent a showing of manifest abuse of that discretion. *See generally Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325 (1962). Having properly found defendant's appeal to be valid and timely, the Commission did not err in denying plaintiff's motion for a penalty award. Plaintiff's assignments of error are overruled.

The opinion and award of the Commission is

Affirmed.

Judges ARNOLD and MARTIN (Harry C.) concur.

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2. The provisions of Rules XXI and XXI-1a are not entirely consistent and may therefore present a potential for confusion as to the various steps to be taken in appealing to the Full Commission from an award by a Hearing Commissioner. Defendants' filing of a so-called "protective" appeal in this case, a term not found in the rules, suggests a need for clarification.

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**Light v. Equitable Life Assurance Society**

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MARIE HOPPER LIGHT, INDIVIDUALLY, AND MARIE HOPPER LIGHT, EXECUTRIX OF THE ESTATE OF LUTHER CURTIS LIGHT, DECEASED, PLAINTIFFS  
v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,  
DEFENDANT AND THIRD-PARTY PLAINTIFF v. MARCELLE SAUNDERS LIGHT,  
THIRD-PARTY DEFENDANT

No. 8117SC430

(Filed 16 February 1982)

**Insurance § 29.1— intent to change beneficiary—failure to insert policy number—original beneficiary recovers**

The trial court erred in entering summary judgment for the plaintiff who had presented several affidavits supporting her claim that decedent and plaintiff went to the personnel office of their place of work and together requested change of beneficiary forms in order that decedent could change all of his insurance to name plaintiff as beneficiary and plaintiff would change all of her insurance to designate decedent as beneficiary; that the personnel at their place of work failed to insert one of the policy numbers on decedent's change of beneficiary form, and that, as a result, decedent's first wife remained beneficiary on one of the insurance policies. The equitable remedy of reformation is available when, because of the mutual mistake of the parties, the agreement expressed in a written instrument differs from the actual agreement made by the parties. The omission of the policy number from decedent's change of beneficiary form was due to the unilateral mistake of decedent, and the proceeds of the insurance policy should be paid to decedent's first wife, as named beneficiary on the policy.

Judge MARTIN (Robert M.) dissents.

APPEAL by third-party defendant, Marcelle Saunders Light, from *Davis, Judge*. Judgment entered 26 January 1981 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals on 9 December 1981.

This is a civil action wherein plaintiff, Marie Hopper Light, individually and as executrix of the estate of Luther Curtis Light, seeks to have a change in beneficiary form "reformed to speak the truth and to correct [a] mistake and inadvertent omission by inserting the appropriate numerals for . . . [a] supplemental insurance" policy issued by defendant insurance company on the life of Luther Curtis Light. Plaintiff also seeks to recover judgment against the defendant, Equitable Life Assurance, in the sum of \$30,000, as the true beneficiary of the life insurance policy.

In her complaint, plaintiff alleged that she was married to Luther Curtis Light on 10 February 1974; that defendant Equita-

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**Light v. Equitable Life Assurance Society**

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ble Life Assurance insured his life under three policies numbered #3920, #3920-D, and #14599; and that this insurance coverage was afforded Luther Curtis Light by his employer, Fieldcrest Mills. Plaintiff also alleged that on 11 September 1973 Luther Curtis Light went to the offices of Fieldcrest, agent of defendant Equitable Life Assurance, with the specific purpose of changing the designated beneficiary of all the insurance policies issued by defendant on his life; that he was provided a change of beneficiary form; and that he executed the form. Plaintiff also alleged that not all of the identifying insurance policy numbers were inserted by the Fieldcrest personnel on the change of beneficiary form, and that such omission was the result of some inadvertence, mistake, or oversight of the Fieldcrest personnel, who were acting as agents of defendant Equitable Life Assurance. Plaintiff further alleged that the "omission was made without the knowledge, consent, or approval of Luther Curtis Light and constituted a mutual mistake of Luther Curtis Light and the defendant," and that Luther Curtis Light executed the forms intending to substitute the individual plaintiff, who at that time was his girlfriend, as sole beneficiary of all the life insurance proceeds in substitution for Marcelle Saunders Light, who at that time was his wife and who had theretofore been named as sole beneficiary. Plaintiff also alleged that at the time Luther Curtis Light executed the change of beneficiary forms, he was separated from Marcelle Saunders Light and that he was at that time the subject of a civil action instituted against him by Marcelle Saunders Light for alimony and child support. Plaintiff further alleged that Luther Curtis Light and Marcelle Saunders Light were divorced on 7 February 1974. Plaintiff's complaint prayed to have the change of beneficiary form reformed to insert the appropriate numerals of the omitted insurance policy, and that Marie Hopper Light recover of defendant all the life insurance proceeds.

Defendant insurance company filed an answer and admitted issuance of the life insurance policies and that it received and refused to comply with a demand made by the individual plaintiff that it pay her \$30,000 pursuant to supplemental life insurance policy #14599. Defendant insurance company denied that there was any mutual mistake with respect to the change of the beneficiary. Defendant Equitable Life Assurance likewise filed a third-party complaint against third-party defendant Marcelle

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**Light v. Equitable Life Assurance Society**

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Saunders Light, wherein it alleged by way of interpleader that claims for the \$30,000 in insurance proceeds had been made upon it by both the plaintiff and the third-party defendant, that it did not contest the fact that the \$30,000 was due and owing to either the individual plaintiff or the third-party defendant, and that the third-party defendant should be interpleaded so as to allow the court to determine which party was entitled to the proceeds. The third-party complaint prayed for an order allowing defendant Equitable to deposit the \$30,000 into the court and have the court disburse the proceeds to the proper party entitled to said monies.

The interpleaded third-party defendant filed an answer to the third-party complaint and denied plaintiff's allegations of mutual mistake and denied defendant's allegations that she, third-party defendant, should be interpleaded. As a further defense, third-party defendant moved to dismiss the plaintiff's complaint under Rule 12(b)(6). Third-party defendant also prayed that defendant pay her, as lawful beneficiary of policy #14599, the \$30,000 in proceeds.

Plaintiff moved for summary judgment and undertook to support her motion for summary judgment with her own affidavit, which in substance reiterated the allegations of her complaint and also contained the following statements:

[O]n the 11th day of September, 1973, Luther Curtis Light and I obtained and signed change of beneficiary forms so that he would be named the beneficiary of the insurance which I have by virtue of my employment with Fieldcrest Mills, Inc., and I would be named the beneficiary of the insurance he held by virtue of his employment with Fieldcrest Mills, Inc. At that time, I was known as Marie Helen Yeatts.

The change of beneficiary forms which we received at that time, were completely blank except for the printed matter which constituted the form itself. Both he and I checked each of the blocks indicating that we wished to change the beneficiaries on our insurance coverage as required on the face of the form. Each of us designated the other as beneficiary of our respective policies and we signed and dated them. . . .

Neither Luther nor I knew the numbers of our insurance policies and the policy and the certificate numbers were in-



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Light v. Equitable Life Assurance Society

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serted by personnel of the insurance office in accordance with the customary practice of Fieldcrest Mills, Inc.

Through some inadvertence or neglect, personnel in the insurance office of Fieldcrest Mills, Inc., failed to insert all of the policy and certificate numbers applicable to insurance on the life of Luther Curtis Light upon the change of beneficiary form which was executed by him.

. . .

Luther Curtis Light did all that was required by the insurance company and by Fieldcrest Mills, Inc., to accomplish the change of beneficiary and everything that he could have been reasonably expected to do to change the beneficiary to that designated on the change of beneficiary form.

Plaintiff further undertook to support her motion for summary judgment with the following:

(1) The affidavit of Louise Lay, an employee of Fieldcrest, which stated:

I recall being present at the Mill in September, 1973, when Luther and Marie signed forms to change the beneficiaries of their insurance with Fieldcrest. They had been going together for a long time and Luther's wife was suing him for alimony. They told me they wanted to change the beneficiaries of their insurance. Luther said he didn't want his wife to be his beneficiary. He wanted Marie to have his insurance benefits. Marie said her children had been her beneficiary and she wanted to change it to make Luther her beneficiary.

They were very much in love at the time;

(2) the affidavit of Raven Ellis, which stated that he was Manager of Employee Benefits at Fieldcrest, that among those benefits is a group life insurance program through Equitable Life Assurance, and that

[w]ith respect to the matters involving requests by employees for the change of designated beneficiaries of their life insurance coverages, Fieldcrest Mills, Inc., acts as agent of the insurance company in that the change of beneficiary

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forms are provided to "Fieldcrest" by the insurance company; "Fieldcrest" personnel distributes the form to employees desiring to change beneficiaries; "Fieldcrest" personnel will render assistance to employees in explaining and filling out the forms; upon request by authorized personnel of "Fieldcrest", the insurance office of "Fieldcrest" will furnish the numbers of policies and certificates to be inserted in the form; and the insurance office of "Fieldcrest" will receive and file the completed forms and otherwise maintain the records relating to the beneficiaries of the insured as a part of the agreement between "Fieldcrest" and the insurance company for the administration of the insurance program. An employee may change the beneficiary of his life insurance coverages from time to time by written request filed with the employer;

(3) the affidavit of Frances Jarrett, which stated that

On or about September 11, 1973, Luther Curtis Light, usually called Curtis, and Marie Helen Yeatts asked me to act as a witness to signatures on forms to change the beneficiaries of the group insurance they held as employees at Fieldcrest. I was glad to be of assistance and witnessed their signatures as requested [sic].

I do not recall whether insurance policy or certificate numbers were inserted on the form at the time I signed as witness. I did not participate in filling out the forms other than to sign as a witness.

According to what Curtis said at the time, I understood that he wanted to make Marie Yeatts the beneficiary of all of his insurance. And I am of the opinion that he believed that the form he signed would accomplish that purpose;

(4) the affidavit of Jack Jarrett, which stated that

As part of my duties as Personnel Manager of the Sheeting and Blanket Mill, Draper Section, Fieldcrest Mills, I provided insurance company forms to enable Luther Curtis Light and Marie Helen Yeatts to change the designated beneficiaries of the insurance they held as employees of the company.

It was and still is customary for employees of this plant to come to my office to obtain the necessary forms to change

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the beneficiary of group insurance provided for them by the company. On or about September 11, 1973, Curtis came to my office, requested the forms and told me that he and Marie were planning to get married and that they wanted to change their insurance over to each other. According to the way he talked, I understood that he wanted to make Marie the beneficiary of all of his insurance and that she wanted to make him beneficiary of all of her insurance.

I furnished a form for Curtis and a form for Marie to sign and return. A copy of the blank form furnished for each of them is attached hereto.

. . .

In my opinion Curtis had the impression that he was doing all that was necessary to change the beneficiary of all of his insurance when he sent his form in to the office.

Employees rarely know the numbers of their insurance policies and certificates and it would not have been unusual for some personnel of the company to assist with the insertion of numbers for insurance policies and certificates. I do not know whether anyone assisted Curtis or not;

(5) the affidavit of John Cassell, which stated that he was a co-employee of Luther Curtis Light and knew him well. The affidavit further stated that

I was well aware of his domestic trouble with his first wife, Marcelle, and the courtship of his second wife, Marie. I know that Luther wanted Marie to be beneficiary of all of his insurance because he didn't want his first wife to have any more than she had already gotten from what he regarded as a very costly divorce settlement.

In 1973 it would have been customary for some appropriate personnel of Fieldcrest Mills to assist with the insertion of insurance policy and certificate numbers to accomplish the change of a designated beneficiary for the reason that employees rarely know the numbers and were not acquainted with the forms.

The court denied the third-party defendant's motion to dismiss and allowed summary judgment for plaintiff and ordered

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that the change of beneficiary form be reformed to include life insurance policy #14599, that the court pay the individual plaintiff the \$30,000 in insurance proceeds received from defendant, and that the costs of the action be taxed against the third-party defendant. Marcelle Saunders Light, third-party defendant, appealed.

*Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for plaintiff appellee.*

*Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant appellee.*

*Lunsford & West, by John W. Lunsford, for third-party defendant appellant.*

HEDRICK, Judge.

By entering summary judgment for the plaintiff, the trial judge obviously concluded from an examination of the pleadings, affidavits, and exhibits that there were no genuine issues of material fact, and that plaintiff was entitled as a matter of law to have the change of beneficiary form "reformed to speak the truth and to correct the mistake and inadvertent omission by inserting the appropriate numerals for the designation of the . . . supplemental insurance issued by defendant on the life of Luther Curtis Light under #14599" because of the "mutual mistake" of Luther Curtis Light and defendant. We agree that there are no genuine issues of material fact. Our review, therefore, is limited to determining whether the individual plaintiff or the third-party defendant is entitled to summary judgment.

The equitable remedy of reformation is available when, because of the mutual mistake of the parties, the agreement expressed in a written instrument differs from the actual agreement made by the parties. *Durham v. Creech*, 32 N.C. App. 55, 231 S.E. 2d 163 (1977). The mistake of only one party to the instrument, if such mistake was not induced by the fraud of the other party, affords no ground for relief by reformation. *Parker v. Pittman*, 18 N.C. App. 500, 197 S.E. 2d 570 (1973). The party asking for relief, by reformation of a written instrument, must prove, first, that a material stipulation was agreed upon by the parties to be incorporated in the instrument as written; and, second, that such

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stipulation was omitted from the instrument by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draftsman. *Matthews v. Shamrock Van Lines, Inc.*, 264 N.C. 722, 142 S.E. 2d 665 (1965). Equity will give relief by reformation only when a mistake has been made, and the written instrument, because of the mistake, does not express the true intent of both parties. *Matthews v. Shamrock Van Lines, Inc.*, *supra*. "[R]eformation on grounds of mutual mistake is available only where the evidence is clear, cogent and convincing." *Durham v. Creech*, *supra* at 59, 231 S.E. 2d at 166.

In the present case, the process of changing the beneficiary was the sole responsibility of the insured. The only part played by the insurance company was to provide the form for making any change desired by the insured. The form provided by the defendant company through its agent, Fieldcrest Mills, Inc., contained the following instructions:

This form is to be properly completed in duplicate and submitted to your employer so that the insurance records may be changed. . . .

Refer to your certificate(s) or to your Insurance Advisor for any questions. . . .

Insert all your Group Life and Group AD&D Policy and Certificate Numbers on which you want the beneficiaries changed.

NOTE: THE CHANGE WILL BE MADE ONLY UNDER THE NUMBERS SHOWN.

The evidence offered in support of plaintiff's motion for summary judgment discloses that the omission of policy #14599 from the change of beneficiary form was due to the unilateral mistake of the insured, Luther Curtis Light. Assuming *arguendo* that the competent evidence in the record raises an inference that the insured intended to make the individual plaintiff the beneficiary of policy #14599, the nature of the act of changing the beneficiary is such as to preclude the insurance company's having any intention with regard thereto. Since the record discloses an absolute bar to plaintiff's claim to have the individual plaintiff made the beneficiary of policy #14599 because of the mutual mistake of the insured and the defendant insurance company, summary judg-

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ment for plaintiff was improper and must be reversed. G.S. § 1A-1, Rule 56(c) provides that judgment shall be entered for any party if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, disclose there are no genuine issues of material fact and that any party is entitled to judgment as a matter of law. Since there are no genuine issues of material fact and since the defendant insurance company has admitted it is liable on policy #14599 to either the plaintiff or the third-party defendant, and since the record discloses and we have concluded that the individual plaintiff is not entitled on this record to recover the proceeds from policy #14599, and since the record establishes that the third-party defendant is the named beneficiary of policy #14599, the third-party defendant, Marcelle Saunders Light, is entitled to recover from defendant Equitable Life Assurance the sum of \$30,000, and since the defendant has paid that sum into court, this cause is remanded to the superior court with directions that judgment be entered in favor of the third-party defendant against the defendant, Equitable Life Assurance, and that the court enter an order requiring the sums heretofore deposited by the defendant insurance company be paid to the third-party defendant.

Reversed and remanded with instructions.

Chief Judge MORRIS concurs.

Judge MARTIN (Robert M.) dissents.

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STATE OF NORTH CAROLINA v. IRVING HOUSTON SIMMONS

No. 8118SC769

(Filed 16 February 1982)

**1. Constitutional Law § 67— disclosure of identity of person not required**

Defendant's constitutional rights were not violated by the trial court's denial of his motion to require the State to disclose the full identity of a man called "Pete" who introduced to defendant an undercover agent who allegedly purchased cocaine from defendant or to dismiss the charges against defendant where there was nothing in the record to indicate that "Pete" was an informer or that he participated in the drug transaction for which defendant was tried,

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and where the State in no way relied on "Pete's" activities to gain an indictment or conviction of defendant.

**2. Criminal Law § 162— necessity for objections**

Defendant's failure to object to questions on cross-examination about his criminal record constituted a waiver of his objections.

**3. Constitutional Law §§ 46, 49— denial of motion to appoint new counsel— waiver of counsel— effective assistance of counsel**

Defendant was not denied the effective assistance of counsel at his trial on an habitual felon charge when the court denied his request for the discharge of his court-appointed counsel and the appointment of new counsel after the jury had returned a verdict against defendant on one narcotics charge and while it was deliberating on a second narcotics charge where the court found that defendant's counsel was competent, the court made the determinations required by G.S. 15A-1242, defendant made it clear to the court that he wanted newly-appointed counsel or none at all, and defendant voluntarily and understandingly waived his right to counsel on the habitual felon charge.

APPEAL by defendant from *Rousseau, Judge*. Judgments entered 27 February 1981, in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 January 1982.

Defendant was charged in separate indictments, proper in form, with possession with intent to sell a controlled substance, cocaine, sale and delivery of cocaine, and being an habitual felon. At his trial, the State presented evidence tending to show that Nancy Farrish, a Durham Police Department undercover agent assigned to Greensboro, met with the defendant on several occasions including the day of 9 May 1980. On 9 May, she purchased from him for \$50 a white powdery substance which was identified by a forensic chemist as being a Schedule II (G.S. 90-90) controlled substance, cocaine.

The defendant testified on his own behalf that, although he had met Farrish, he had never sold her any cocaine. According to defendant, a man named "Pete" introduced Farrish to him as his niece. Although "Pete" tried at various times to talk defendant into selling drugs for him, defendant refused.

While the jury was deliberating, defendant asked the court to discharge his court-appointed attorney. After hearing the motion, the trial court denied defendant's request for newly-appointed counsel, and defendant elected to proceed with the habitual felon charge without counsel.

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The jury returned guilty verdicts on the charges of possession with intent to sell cocaine and sale of cocaine.

The charge that defendant was an habitual felon was tried before a newly-impaneled jury. The State presented evidence tending to show that in 1972, in the State of Georgia, defendant had been convicted of one count of rape and two counts of aggravated assault with intent to rape. In June 1976, a jury in Guilford County had found defendant guilty of armed robbery.

The defendant offered no evidence.

The jury found the defendant guilty of being an habitual felon. On the charges of sale and delivery of cocaine and of being an habitual felon, defendant was sentenced to a maximum term of 50 years. On the charge of possession with intent to sell cocaine, defendant received a minimum of ten years and a maximum of ten years imprisonment. He has appealed.

*Attorney General Edmisten, by Assistant Attorney General David Gordon and Special Deputy Attorney General Jo Anne Sanford, for the State.*

*Appellate Defender Project for North Carolina, by Appellate Defender Adam Stein, for defendant-appellant.*

MARTIN (Robert M.), Judge.

[1] Prior to his trial, defendant filed a motion requesting that the State be required to furnish the identity of an informant or, in the alternative, that the cases against him be dismissed. The person defendant wanted identified in full was the man called "Pete." The record shows that, on the day of the trial, his full name was divulged. Defendant's alternative motion to dismiss was denied by the trial court.

The defendant now assigns as error the trial court's denial of his motion to disclose the full identity of "Pete" and his motion to dismiss. Citing *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957) and our recent case, *State v. Hodges*, 51 N.C. App. 229, 275 S.E. 2d 533 (1981), the defendant contends that the court's denial of his motions deprived him of his constitutional rights to present a defense, to confront his accusers, and to be afforded fundamental fairness and due process of law.



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The State has the privilege, in appropriate situations, to withhold from disclosure the identity of persons who furnish to law enforcement officers information concerning violations of laws which the officers must enforce. *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938). The purpose of this privilege is to advance and protect the public interest in effective law enforcement. *Roviaro v. United States*, *supra*. The privilege, however, has certain limitations, one of which arises from the fundamental requirements of fairness to the accused. *Id.* "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61, 77 S.Ct. at 628, 1 L.Ed. 2d at 645.

With these principles guiding our analysis of the factual situation in the case *sub judice*, we have determined that defendant's constitutional rights were not violated by the trial court's denial of his motions for disclosure and dismissal. It is important to note that there was nothing in the record to indicate that "Pete" was an informer or that he participated in the drug transaction for which defendant was tried. The State in no way relied on "Pete's" activities to gain an indictment against, or a conviction of, the defendant. When we contrast this with the factual setting in *Roviaro*, we find that that case's limitation on the State's privilege does not apply here. In *Roviaro*, the informer, "John Doe," was the person actually purchasing the drugs from the defendant. Defendant's convictions were obtained through testimony of alleged witnesses who observed the transactions without defendant's knowledge. As the Supreme Court noted, as far as *Roviaro* knew, he and "John Doe" were alone and unobserved during the crucial occurrence for which he was indicted. By contrast, in the case before us, Officer Farrish was the one who purchased the drugs from defendant, and she was the prosecuting witness against him. The State's case did not require any evidence concerning "Pete."

Moreover, we find that the *Hodges* case which this Court recently decided is distinguishable. In *Hodges*, unlike this case, the person whose name was undisclosed was allegedly a participating informant. Furthermore, once the defendant discovered the name of the informant (the day before trial) he moved for a continuance, but the motion was denied. This Court found that

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denial error. In the present case, defendant made no motion for a continuance. Once he received the full name of the person whose identity he sought, he was, as the record shows, adamant about a dismissal.

THE COURT: Well, what is your motion now, Mr. Carroll?

MR. CARROLL: I made my motion in the alternative, either disclosure or dismissal of the cases.

THE COURT: Either disclosure or dismissal?

MR. CARROLL: Yes, sir.

THE COURT: Well, he has now disclosed it.

MR. CARROLL: I can only repeat what I have said. As far as disclosure goes, we don't have reasonable access to him at this stage.

Based on the foregoing, we conclude that defendant's constitutional rights to present a defense, to confront witnesses against him, and to be afforded fundamental fairness and due process of law were not violated.

[2] Defendant's second argument is that he did not receive a fair trial and due process of law when the State cross-examined the defendant about his prior criminal record. The record shows, however, that defendant objected to only two of the questions to which he now takes exception. Those objections were sustained. Of the other eleven exceptions, defendant's failure to object to the questions acted as a waiver of his objections so that admission of the evidence will not be reviewed on appeal unless the evidence was forbidden by statute or resulted from questions asked by the trial judge or by a juror. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, *cert. denied*, 400 U.S. 946, 91 S.Ct. 253, 27 L.Ed. 2d 252 (1970). The two exceptions allowing review by this Court are not present here, and the cases defendant cites in support of his argument that we should waive the requirement of an objection are not pertinent. *State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978); *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971), and *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967), all involved improper or abusive comments or arguments made by the solicitor. Defendant's assignment of error is overruled.

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For the same reason, we reject defendant's argument that he was deprived of a fair trial and of due process of law when the State asked the defendant questions concerning what statements he had made to a police officer. Defendant's failure to object to the questions constituted a waiver of his objections, and this Court is not compelled to review the matter on appeal.

[3] Defendant's fourth assignment of error raises the question of whether he was denied his constitutional guarantee to effective assistance of counsel at the trial on the habitual felon indictment when the court denied his request for appointment of new counsel and left the defendant to represent himself. The right of defendant to be represented by counsel is well-established, *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2066, 32 L.Ed. 2d 530 (1972). Such a right can be effectively waived where the waiver is voluntary and informed. The issue before us is whether defendant voluntarily and with knowledge of the consequences waived his right to counsel. We find that the record shows that the defendant understood the serious consequences of his proceeding without counsel but that defendant voluntarily chose to have counsel discharged.

In cases where a defendant requests to proceed at trial without assistance of counsel, the trial court must make a thorough inquiry to determine whether to allow or deny the request. G.S. 15A-1242. In order to allow the motion, the court must be satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

G.S. 15A-1242.

The record reveals that, after the jury returned a guilty verdict on one count and was deliberating on the second, the defendant requested that his court-appointed attorney be discharged. The trial court, after colloquy with the defendant, found his

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counsel competent and refused defendant's request. Defendant impressed upon the court that he wanted newly-appointed counsel or none at all. The following excerpts from the record show parts of the colloquy which preceded the court's decision:

THE COURT: You understand your case has been tried and they have returned one verdict of guilty against you and that they are out finishing the verdict on the other case.

Then there is another proceeding that we will go into after this to determine if you are an habitual felon. And if you are an habitual felon, that increases the time you could be given.

. . .

THE COURT: You have Mr. Carroll to represent you. And, as I say, if the Jury finds you guilty of being an habitual felon, the punishment goes up from twenty years to life imprisonment.

MR. SIMMONS: That is one of the reasons I would like to have a competent attorney to represent me.

THE COURT: I haven't seen anything to determine that Mr. Carroll is not competent just because you don't agree eye to eye on everything. He has more knowledge of the law than you have.

MR. SIMMONS: That is not the issue.

. . .

THE COURT: . . . And on these grounds, I am not going to relieve Mr. Carroll and appoint you another attorney.

Now, if you want to be tried on the remaining phases of this case without a lawyer, you have that right, but that is for you to decide, not me.

. . .

MR. SIMMONS: I will appear in the remaining phases by myself.

THE COURT: Do you understand that when you represent yourself there is some danger to it for the reason of your not

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being trained in the law and certain things like being tried under the law gives a person advantages?

MR. SIMMONS: Yes, sir.

We find from the foregoing, that the trial court met the requirements of G.S. 15A-1242 and that defendant voluntarily and understandingly waived his right to counsel.

Defendant's final argument is that the evidence by the State was insufficient to prove that the substance purchased by Farrish was a controlled substance. The record belies this argument. The forensic chemist of the State Bureau of Investigation testified without objection that "the white powder was the substance cocaine, which is a Schedule II controlled substance."

In defendant's trial, this Court finds

No error.

Chief Judge MORRIS and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. GREGORY GORDON HOWARD AND  
DEBORAH PATTON JONES

No. 8120SC842

(Filed 16 February 1982)

**1. Searches and Seizures §§ 16, 18— search of home and automobile proper— consent**

The trial court properly admitted into evidence items obtained pursuant to warrantless searches of a house and an automobile where the evidence indicated one defendant voluntarily gave consent to the search of both premises and to the seizure of items within.

**2. Criminal Law § 77.3— statement of codefendant—other defendant not incriminated**

Admission of a statement by a nontestifying codefendant "that she had a good idea that the items were stolen" did not violate the *Bruton* rule as the statement in no way incriminated the other defendant or contradicted his testimony.

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**3. Constitutional Law § 48— codefendants represented by one attorney—effective assistance of counsel**

In a prosecution in which both defendants were represented by one attorney, both defendants failed to show that there was an actual conflict of interest which adversely affected the counsel's performance on behalf of either defendant.

**4. Criminal Law § 34.6— evidence of commission of another crime—admissible to show knowledge**

The trial court did not err in admitting testimony by an officer in which he stated that one defendant replied "that she had a good idea the items were stolen" in response to a statement concerning his disbelief that stolen property would be found in defendant's home and she would not have knowledge of it. Evidence that defendant had knowledge that other items were stolen was admissible as evidence that she also had knowledge that the items for which she was charged were stolen.

APPEAL by defendants from *Helms, Judge*. Judgments entered 13 March 1981 in Superior Court, UNION County. Heard in the Court of Appeals on 14 January 1982.

Defendants Gregory Howard and Deborah Jones were charged in proper bills of indictment with felonious breaking or entering, felonious larceny, and felonious receiving stolen property. Defendant Howard was found guilty of felonious breaking and entering and of felonious larceny. Defendant Jones was found guilty of nonfelonious receiving stolen goods. From judgments imposing two consecutive prison terms of no more than five nor less than three years, the second of which was suspended, defendant Howard appealed. From a judgment imposing a prison sentence of two years, six months of which were active and the remainder of which was suspended, defendant Jones appealed.

*Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Jo Anne Sanford, for the State.*

*George Daly for defendant appellants.*

HEDRICK, Judge.

[1] Defendants' first three assignments of error are directed to the court's order admitting into evidence certain items obtained pursuant to police searches of a house and an automobile. Defendants argue that this evidence should have been suppressed in that it was obtained as a result of an unconstitutional search and

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seizure to which both defendant Jones and defendant Howard had standing to object.

The findings and conclusions of a trial judge, upon *voir dire* to determine the admissibility of evidence, are not subject to reversal on appeal if they are supported by competent evidence. *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977); *State v. Hawley*, 54 N.C. App. 293, 283 S.E. 2d 387 (1981). In the present case, the trial judge conducted a *voir dire* at which the evidence tended to show the following:

On 13 December 1980, law enforcement officers went to defendant Jones' residence at 104 Hillcrest Circle in Indian Trail, North Carolina. Defendant Jones spoke with the officers and appeared coherent and to understand what was being said to her by the officers. She told the officers that the house at 104 Hillcrest Circle was her home. The house in fact was her home. One officer asked defendant Jones for permission to search her house and she voluntarily gave the officer such permission and executed a consent to search form. The officers used no promises, threats, coercion, or undue influence on defendant Jones in procuring her permission to search her residence. Defendant Jones said that a 1972 Pontiac in front of her house was her car. A woman named Deborah Jones, who fit defendant Jones' description, had previously been seen driving the 1972 Pontiac. She gave the officer permission to search the car and indicated that permission by placing her initials on an additional notation on the consent to search form. The consent to search form signed by defendant Jones authorized the officers to remove any stolen property, contraband, or any other materials or evidence of a crime found during the search. After defendant Jones gave such authorization, the officers conducted a search of her home and seized items of stolen property found therein. The officers also searched defendant Jones' automobile and seized two sets of nail pullers found therein and identified by defendant Howard as belonging to him.

At the conclusion of the *voir dire*, the trial judge made findings of fact consistent with and supported by the evidence recounted, and this Court is bound by such findings of fact.

Also at the conclusion of *voir dire*, the trial judge concluded as a matter of law that the consent to search the house and vehicle was lawfully obtained and ordered that the evidence seized as

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a result of the search be admitted into evidence. A person may consent to a search of premises he or she jointly uses or occupies with another, and evidence found pursuant to such a search may constitutionally be used against that other if the person giving consent to the search has rights of use or occupation at least equal to those of the other. *State v. Melvin*, 32 N.C. App. 772, 233 S.E. 2d 636 (1977); *see also State v. McNeill*, 33 N.C. App. 317, 235 S.E. 2d 274 (1977). Furthermore, the statutory law in North Carolina allows a law enforcement officer to conduct a search and make seizures if voluntary consent is given by a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises. G.S. §§ 15A-221-222; *State v. Reagan*, 35 N.C. App. 140, 240 S.E. 2d 805 (1978). A seizure of an item is also constitutionally permissible if the officer making the seizure has probable cause to believe that the object seized constitutes contraband or evidence of a crime. *State v. Beaver*, 37 N.C. App. 513, 246 S.E. 2d 535 (1978). In the present case, evidence was presented and findings of fact consistent therewith were made that defendant Jones was a person with extensive use and control of the premises searched and the items seized, that she voluntarily gave consent to a search of the premises and to a seizure of such items, and that the items seized were known to be stolen property and evidence of a crime. The evidence adduced at *voir dire* therefore supported the court's critical findings of fact, which in turn support the order admitting the seized items into evidence. Even if defendant Howard had standing to object to an improper search and seizure of the premises and vehicle in the present case, such standing is unavailing where, as here, we uphold the trial court's ruling that the search and seizure were in all respects proper. *See United States v. Matlock*, 415 U.S. 164, 39 L.Ed. 2d 242, 94 S.Ct. 988 (1974); *United States v. Sumlin*, 567 F. 2d 684 (6th Cir. 1977), *cert. denied* 435 U.S. 932, 55 L.Ed. 2d 529, 98 S.Ct. 1507 (1978). Defendants' first three assignments of error are without merit.

[2] Defendants next assign as error the admission into evidence of testimony by Officer Randy Cox that defendant Jones stated to him "that she had a good idea that the items were stolen." Defendants argue that the admission of this testimony and the failure of defendant Jones to testify unconstitutionally prejudiced defendant Howard in that he was deprived of his right to con-



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front a witness against him; defendant Howard argues that defendant Jones' statement implicated him in that it contradicted his testimony that he had purchased the items.

Under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476, it is a clear violation of a defendant's constitutional rights in a joint trial to offer the confession of a co-defendant who does not testify where the confession incriminates and implicates the defendant not making the statement. In this instance, the defendant who is incriminated and implicated by the statement has been denied his Sixth Amendment right to confront and cross-examine the co-defendant making the statement.

*State v. Johnson*, 29 N.C. App. 534, 536-37, 225 S.E. 2d 113, 115 (1976). "The *sine quo non* for application of *Bruton* is that the party claiming incrimination without confrontation at least be incriminated." *State v. Jones*, 280 N.C. 322, 340, 185 S.E. 2d 858, 869 (1972).

The statement by defendant Jones in the present case did not make reference to defendant Howard. The portion of her statement suggesting that the goods were stolen does not suggest that they were stolen by defendant Howard and further, is not even logically inconsistent with his testimony that he purchased the goods; defendant Howard may have purchased goods, which, unbeknownst to him, were stolen and known to be stolen by defendant Jones. Defendant Jones' statement in no way incriminated defendant Howard or contradicted his testimony. This assignment of error has no merit.

[3] By their next assignment of error, defendants argue that the joint trial was tainted by an "obvious conflict of interest between Defendants Howard and Jones," and that each defendant received ineffective assistance of counsel.

The contention of defendant Howard is that defendants' trial counsel consciously pursued the advantage of defendant Jones, to the disadvantage and prejudice of defendant Howard. Defendant Howard points out the following as indicative of a prejudicial conflict of interest depriving him of effective assistance of counsel: (1) counsel's failure to request limiting instructions after testimony was given that defendant Jones' said "she had a good idea the

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items were stolen" and after testimony that the license plate numbers on defendant Jones' Pontiac had been altered; and (2) counsel's eliciting testimony from defense witness Douglas Jones, husband of defendant Jones, about a conversation he had with Officer Bill Medlin in which Officer Medlin made statements to the effect that he did not believe defendant Jones to be guilty but he firmly believed that defendant Howard was guilty.

We note that defendant Howard nowhere objected before or during trial to being represented by the same counsel as defendant Jones. In order to establish a conflict of interest violation of the constitutional right to effective assistance of counsel, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L.Ed. 2d 333, 346-47, 100 S.Ct. 1708, 1718 (1980). Unconstitutional multiple representation is never harmless error, and, therefore, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan*, *supra* at 349-50, 64 L.Ed. 2d at 347, 100 S.Ct. at 1719. "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler v. Sullivan*, *supra* at 350, 64 L.Ed. 2d at 347, 100 S.Ct. at 1719.

Defendant Howard has failed in the present case to show that there was an actual conflict of interest. As discussed above, the testimony that defendant Jones knew the goods were stolen did not incriminate defendant Howard. Further, the testimony about the altered license plates similarly did not incriminate defendant Howard in that it did not even state who did the alterations. Finally, counsel's elicitation of testimony from Douglas Jones in no way demonstrated that the lawyer had an interest in exonerating client Jones at the expense or incrimination of defendant Howard; while Douglas Jones' testimony may have tended to exculpate defendant Jones by showing that the officers really did not believe her guilty, it did not have an opposite incriminating effect with respect to defendant Howard, since the testimony only reiterated what was manifest by the very fact that the State proceeded with its prosecution of defendant Howard, *i.e.* that the officers believed that he was guilty. Further-

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more, Douglas Jones' testimony was about how Officers Medlin and Laney, witnesses in this case, tried to get Douglas Jones to persuade his wife to turn State's evidence against defendant Howard since they were "wanting" and "were after" defendant Howard; this evidence, coupled with the fact that defendant Jones did not turn State's evidence and was prosecuted despite evidence that the officers did not "feel that she was probably guilty," tends to cast doubt on the integrity of the entire prosecution and thereby assists defendant Howard. Nothing indicates a conflict of interest adversely affecting counsel's performance in behalf of defendant Howard.

Defendant Jones argues that she received ineffective representation by counsel in that counsel's elicitation of Douglas Jones' testimony "invit[ed] the jury to be prejudiced against Defendant Jones for her failure on this record to cooperate with the Deputies." Such testimony, however, could have just as easily tended to exculpate defendant Jones insofar as it contained statements that the deputies did not believe her guilty and insofar as it tended to impeach the integrity of the entire prosecution, as discussed above. The incompetency of counsel for the defendant in a criminal prosecution is not a denial of his constitutional right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and mockery of justice. *State v. Hensly*, 294 N.C. 231, 240 S.E. 2d 332, (1978). As in *State v. Jordan*, 49 N.C. App. 561, 571, 272 S.E. 2d 405, 411 (1980),

[t]he record discloses that defendant's trial counsel presented evidence on the defendant's behalf, entered objections to the State's evidence, and conducted effective cross-examination of the State's witnesses. It is quite clear that defendant's representation at trial was not so lacking that [her] trial became a farce and mockery of justice.

This assignment of error is overruled.

[4] Finally, defendant Jones assigns as error the admission into evidence of testimony by Officer Cox about a conversation he had with Mrs. Jones in which he stated, "[I]t was hard for me to believe all this stolen property would be in her house and her not have knowledge of it," and to which she replied "that she had a good idea the items were stolen." Defendant argues that this testimony imputes to defendant knowledge that she possessed

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certain articles of stolen property other than the stolen property charged in this case, and that the testimony was therefore inadmissible evidence of commission of another crime.

Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; if, however the evidence tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime. *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978). "[T]he accused's possession of other stolen goods is evidence of his knowledge of the stolen character of goods which he is charged with having knowingly received." 1 Stansbury's N.C. Evidence § 92 (Brandis rev. 1973); see also *State v. Gregory*, 32 N.C. App. 762, 233 S.E. 2d 623, *disc. rev. denied*, 292 N.C. 732, 236 S.E. 2d 702 (1977). In the present case, evidence that defendant Jones had knowledge that the other items were stolen was admissible as evidence that she also had knowledge that the items for which she was charged were stolen. This assignment of error is without merit.

We hold defendants had a fair trial free of prejudicial error.

No error.

Judges HILL and BECTON concur.

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STATE OF NORTH CAROLINA v. CHARLES ELVIE ROMERO

No. 818SC632

(Filed 16 February 1982)

**1. Criminal Law § 75— admissibility of confession—standard of proof**

The State need not prove beyond a reasonable doubt that an incriminating in-custody statement was made freely and voluntarily by defendant in order for the statement to be admissible in evidence.

**2. Criminal Law § 75.4— counsel in other cases—in-custody statements in absence of counsel—waiver of counsel**

Defendant's due process rights were not violated because an officer interrogated him about a burglary charge in Greene County without the presence of an attorney who was representing him on breaking and entering charges in

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Johnston County since (1) there was no indication that defendant's counsel in Johnston County also represented defendant in the Greene County case, and (2) even had the attorney entered the Greene County case on defendant's behalf, defendant effectively waived his right to counsel before discussing the Greene County burglary with the officer.

**3. Criminal Law § 34.4— other crimes by defendant—competency to show relationship with accomplice**

Cross-examination of defendant regarding whether his alleged accomplice in the crimes charged had pled guilty in a case in another county in which defendant was convicted on two charges of breaking and entering was competent to show the relationship between defendant and the alleged accomplice in light of the significant role played by the accomplice in a conversation leading to a statement made by defendant in the presence of the accomplice and a deputy sheriff.

**4. Criminal Law § 33.2— evidence of motive—price of drugs and source of money**

Cross-examination of defendant regarding the price of drugs and source of money he used to buy them was competent to show defendant's motive in committing burglary and larceny.

**5. Criminal Law § 85.2— improper impeachment of defendant's character—curative instructions**

Although testimony by two State's witnesses concerning defendant's prior arrests may have tended to impeach his character and credibility before defendant put his character in issue, any prejudice was cured when the trial judge sustained objections to the testimony and instructed the jury not to consider the testimony elicited.

APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 19 February 1981 in Superior Court, GREENE County. Heard in the Court of Appeals 18 November 1981.

Defendant was indicted for burglary in the second degree, larceny after breaking and entering, and receiving and possession of stolen goods.

The evidence tended to show that Mary Shackelford's home at Walstonburg in Greene County was broken into on 29 January 1980, and that several items, including a television set, rifle, cedar chest, telephone, silver cream pitcher and some jewelry were stolen. The state's case against defendant rested on three inculpatory statements made by defendant to authorities.

Ben Edmondson of the Greene County Sheriff's Department testified on voir dire that he took a statement from defendant in October of 1980 in which defendant admitted participating in the January breakin. He testified that he spoke to defendant some-

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time after the first of October and advised defendant of his rights before taking the confession. Edmondson did not reduce the statement to writing until the day of trial. Defendant on voir dire testified that he was not guilty, but that he gave a false confession in reliance on Edmondson's promise that he would be sentenced to no more than five years confinement if he pled guilty. He also said that he confessed to the breakin because he faced charges in Johnston County on which he knew he would be incarcerated, and he wanted to take the blame for another man charged in the Greene County burglary, Ritchie Creech, because he thought the five-year sentence would run concurrently with the time he would have to serve on his sentence stemming from the Johnston County crime. Defendant was represented by counsel in Johnston County at the time, but he was not appointed counsel in Greene County until 24 October. Defendant testified that Creech told him that Creech's father would furnish defendant's bond if defendant would shoulder the blame. Defendant also said that he was "not in his right mind" when he gave the statement to Edmondson, because he had been taking drugs before being confined.

The evidence shows that defendant also confessed to Pitt County Deputy Lee Pascasio on 20 October 1980. Defendant was being held in Greene County for the Shackleford breakin. He had been arrested on 17 October for breaking into a house in Pitt County and had been taken to the Pitt County jail. After arriving in Pitt County on the 17th, defendant was read *Miranda* warnings in relation to the Pitt County breakin, and the defendant at that time indicated that he did not want to make a statement. On 20 October, defendant, accompanied by Creech and Creech's father, approached Deputy Pascasio on the day of defendant's first appearance in Pitt County District Court and asked to speak with the deputy. All four men went to the sheriff's office where defendant told Pascasio that he and a man named Phillip Carraway perpetrated the crimes in Pitt and Greene Counties and that Creech was not involved. Pascasio did not read defendant his *Miranda* rights on 20 October.

Johnston County Deputy Sheriff Richard G. Story testified on voir dire that he transported defendant and Phillip Carraway on 27 January 1981 from Pitt County jail to Johnston County, where defendant was to appear as a witness for the State in a

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criminal trial. During the trip, Carraway stated that Creech was involved in the Greene County breakin, but defendant corrected Carraway and said that it was just he and Carraway who committed the crime.

The trial court found that all three of the statements were made freely and voluntarily and were, therefore, admissible into evidence. Defendant was convicted of burglary in the second degree. Defendant appeals from an order of imprisonment.

*Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney John F. Madrey, for the state.*

*Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.*

MORRIS, Chief Judge.

[1] Defendant challenged the admissibility of all three incriminating statements made by him. The trial court conducted voir dire hearings to determine their admissibility and allowed them into evidence. Defendant urges us on appeal to require that the state prove beyond a reasonable doubt that an inculpatory statement made by a defendant and introduced as evidence was given freely and voluntarily. His argument is made without authority from this state, however. Indeed, to accede to defendant's request would result in the imposition of a significant procedural innovation on our trial judges' treatment of confessions and other incriminatory statements.

The well-settled rule in North Carolina is, simply, that "(a) trial judges' finding that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence." *State v. Harris*, 290 N.C. 681, 693, 228 S.E. 2d 437, 444 (1976); *State v. White*, 298 N.C. 431, 259 S.E. 2d 281 (1979). It appears, based upon the record, that the testimony supporting the voluntariness of defendant's various statements was carefully weighed by the trial judge. After the evidence is admitted, the circumstances under which statements attributed to a defendant were made may be elicited on cross-examination in the presence of the jury. Then "it is for the jury to determine whether the statements referred to in the testimony of the

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witness were in fact made by the defendant and the weight, if any, to be given such statements. . . ." *State v. Walker*, 266 N.C. 269, 273, 145 S.E. 2d 833, 836 (1966). We hold that the evidence presented at the voir dire hearings fully supports the court's rulings that the statements in question were freely and voluntarily made, that defendant's rights were adequately protected, and that the imposition of the standard of proof advanced by defendant, though utilized in some states, is not required by North Carolina law.

[2] Defendant next assigns error to the trial judge's admission of the three statements into evidence on the ground that the first of those statements resulted from a custodial interrogation of the defendant during which defendant's attorney was not present. He contends specifically that his due process rights were violated because Officer Edmondson interrogated him regarding the charges lodged in Greene County outside the presence of the attorney representing him on related breaking and entering charges in Johnston County, and because he was questioned before he had the opportunity, in general, to consult with counsel. Because his confession to Officer Edmondson was wrongfully obtained, says defendant, his subsequent statements should also be suppressed, pursuant to the presumption enunciated in *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968), that where a confession is obtained under circumstances that render it involuntary, subsequent confessions are also presumed to be involuntary.

We agree with defendant that his right to counsel had attached, since the proceedings against him had begun at the time of the interrogation, but we think *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978), is dispositive. There the Supreme Court held that "in determining the admissibility of a confession by a suspect in custody, the crucial question is whether the statement was freely and understandingly made after he had been fully advised of his constitutional rights and had specifically waived his right to remain silent and to have counsel present." *Id.* at 376, 241 S.E. 2d at 681. *State v. Smith*, based on strikingly similar facts to those in the case before us, clearly sets out this state's law regarding waiver of right to counsel when a defendant is represented by a counsel in a proceeding unrelated to the charges under investigation. The record here, just as in *Smith*, offers no indication that defendant's counsel in the Johnston County matter



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also represented defendant in this case. Even had that attorney entered the Greene County proceeding on defendant's behalf—which he apparently had not—defendant would have retained his right to waive counsel. Significantly, the trial judge found that defendant waived his right to counsel before making the statement to Edmondson, and that the statement was “freely, knowingly and understandingly made without threats or promises having been made to him.”

At this point, it need only be said that the rule “that a defendant in custody who is represented by counsel may not waive his constitutional rights in counsel's absence, is not the law in this State.” *Id.* at 375, 241 S.E. 2d at 680. The position taken in defendant's second argument finds authoritative basis only in the laws of a few jurisdictions which have followed *People v. Arthur*, 22 N.Y. 2d 325, 292 N.Y.S. 2d 663, 239 N.E. 2d 537 (1968). Defendant's argument that interrogations conducted in the absence of counsel violate Disciplinary Rule 7-104 of the North Carolina Code of Professional responsibility is unpersuasive. This Code section proscribes only certain conduct by members of the legal profession during the course of representation and does not prevent persons in custody from making inculpatory statements upon waiver of the right to counsel.

[3] Defendant's contention that he should be granted a new trial because the prosecutor attempted to use his prior convictions as substantive evidence of his guilt is not compelling. He contends that the cross-examination of defendant regarding whether Phillip Carraway had pled guilty in the same case in Johnston County in which defendant was convicted of two separate charges of breaking and entering was an attempt to imply that defendant was with Carraway during the Shackelford breakin in Greene County. The state responds that the question was part of an inquiry into the relationship between defendant and Carraway and was, therefore, properly allowed by the trial judge. We agree. The general rule is that when a defendant in a criminal action testifies in his own behalf, the prosecutor may, for the purpose of impeachment and attacking his credibility as a witness, cross-examine him as to previous criminal convictions. *State v. Goodson*, 273 N.C. 128, 159 S.E. 2d 310 (1968). Defendant, however, points to the further cross-examination during which defendant was asked if Phillip Carraway was one of the persons who pled in the Johnston

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County proceedings. His contention that evidence of prior convictions is admissible only to impeach a defendant's credibility as a witness reflects a misunderstanding of the law. It is a well-settled rule that

. . . [e]vidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.

1 Stansbury's N.C. Evidence § 91 (Brandis rev. 1973), quoted in *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971). Evidence of the prior crime was admissible to show the relationship between defendant and Carraway. That relationship is pertinent in light of the significant role played by Carraway in the conversation leading to defendant's statement of 27 January 1981, made in the presence of Carraway and Deputy Story. It is also reasonable to assume that the prosecutor may have thought Carraway would be called to testify, since the trial judge directed that Carraway remain in the Greene County jail in the event he was subpoenaed as a witness.

[4] Defendant argues that he is entitled to a new trial because he was cross-examined regarding the price of drugs and source of the money he used to buy them. However, "[t]he existence of a motive which prompts one to do a particular act, may be considered as 'a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible when the doing of the act is in dispute,' Stansbury, N.C. Evidence, Sec. 83." *State v. Church*, 231 N.C. 39, 42, 55 S.E. 2d 792, 795 (1949). Evidence of attempts to borrow money prior to the commission of an offense was held competent as a motive, showing defendant's need of money, in *State v. Cain*, 175 N.C. 825, 95 S.E. 930 (1918), and *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449 (1944). Defendant's attempts to distinguish these cases from the facts *sub judice* are unconvincing. Moreover, the prosecutor's inquiry had bearing on the veracity of defendant's claims that he used drugs extensively, that he was under the influence of drugs at the time he spoke to Deputy Pascasio, and that he was suffering from the effects of drug withdrawal when he talked to Officer Edmondson.

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[5] Finally, defendant urges that he is entitled to a new trial because he was prejudiced by reference to his arrest for other crimes. He calls attention to statements made from the stand by Deputies Pascasio and Story. Deputy Pascasio, when asked by the state how he came to have a conversation with defendant, replied, "I arrested Mr. Romero for the second degree burglary of a house in Pitt County, North Carolina." When asked where he had seen defendant on 27 January 1981, Deputy Story said: "I first saw him at the Pitt County Jail in Greenville." To both questions objections were made in a timely fashion. The trial judge sustained both objections and twice instructed the jury not to consider the testimony elicited. Though the testimony concerning defendant's prior arrests may have tended to impeach his character and credibility before defendant put his character in issue, the judge's cautionary instructions were curative of any prejudice. Furthermore, defendant's evidence, including his own testimony, conveyed the same information he now alleges to be prejudicial error.

In defendant's trial and the judgment rendered, we find

No error.

Judges HEDRICK and MARTIN (Robert M.) concur.

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STATE OF NORTH CAROLINA v. JAMES W. GAMBLE AND DWIGHT P. TAYLOR

No. 8112SC811

(Filed 16 February 1982)

**Indictment and Warrant § 9.8; Burglary and Unlawful Breakings § 1—larceny—  
"building" not "fenced-in area"—granting motions to quash indictments**

Where two defendants were indicted separately for feloniously breaking or entering a building occupied by a corporation, and in answer to defendants' motions for a bill of particulars, the State informed defendants that the "building" was "the fenced-in area" of the company's warehouse, the trial court did not err in granting the motions to quash and dismiss the indictments as a "fenced-in area" is not a "building" within the meaning of G.S. 14-54.

Judge HEDRICK dissenting.

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APPEAL by the State from *Brannon, Judge*. Order entered 19 May 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 January 1982.

Defendants were indicted separately as follows: "[Defendant] unlawfully and wilfully did feloniously break or enter a building occupied by Carolina Power & Light Company, a corporation, used as a place of business, located at 3505 Camden Road, Fayetteville, North Carolina, with the intent to commit a felony therein, to wit: larceny, in violation of North Carolina General Statutes Section 14-54."

In answer to defendants' motions for a bill of particulars, the State informed defendants that the "building" they are alleged to have entered is "the fenced-in area of the Carolina Power and Light Company Line Warehouse." Defendants thereafter filed motions "to quash and/or dismiss" the indictments on the ground that "the fenced-in area" is not a "building" within the meaning of G.S. 14-54, "and as such breaking or entering a fenced-in area is not a criminal offense" under that statute.

Following extensive findings of fact and conclusions of law, the trial judge allowed the motions to quash and dismiss the indictments on the ground stated above. The State appeals from this order.

*Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.*

*Assistant Public Defenders William L. Livesay and Orlando F. Hudson, Jr. for defendant-appellees.*

HILL, Judge.

The parties stipulated, and the trial judge found, the following facts concerning "the fenced-in area" in which defendants are alleged to have broken or entered:

[The area] is located at 3505 Camden Road in Fayetteville and is partially surrounded by a wire fence 5'10" to 6' tall. This fence runs along the north and eastern sides of the area in question and extends partly along the western and southern sides. In the southwestern corner of the area there is a metal building. The fence comes to within one or two inches

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of the northwestern and southwestern corners of this building, which defines the remainder of the western and southern sides of the area in question. Within this area are spaces for parking cars and trucks, stacks of wooden utility poles, what appear to be transformers and other items of electrical and industrial equipment. Camden Road, a paved road in Fayetteville, runs along the western border some distances from the area in question. The only sign upon the fence or building is the number "3505".

This is a case of first impression in this State. The sole question for our review is whether a "fenced-in area" is a "building" within the meaning of G.S. 14-54, "[b]reaking or entering buildings generally."

G.S. 14-54 reads as follows:

(a) Any person who breaks or enters any *building* with intent to commit any felony or larceny therein shall be punished as a Class H felon.

(b) Any person who wrongfully breaks or enters any *building* is guilty of a misdemeanor and is punishable under G.S. 14-3(a).

(c) As used in this section, "*building*" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

(Emphasis added.) Thus, we must decide if a "fenced-in area" is "any other structure designed to house or secure within it any activity or property." *Id.*

Criminal statutes must be strictly construed. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967).

[W]hen a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, *State v. Humphries*, 210 N.C. 406, 186 S.E. 473 (1936), and the courts will interpret the language to give effect to the legislative intent. *Ikerd v. R.R.*, 209 N.C. 270, 183 S.E. 402 (1936). As this Court said in *State v. Partlow*, 91

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N.C. 550 (1884), the legislative intent “. . . is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. . . .”

*In re Banks*, *supra*, at 239, 244 S.E. 2d at 389 (emphasis original). In the case *sub judice*, the State argues that “[t]he evolution of the present G.S. 14-54 clearly indicates the legislature’s intent to expand its protection to objects other than dwelling houses or buildings.” Defendant, on the other hand, contends that the general phrase “any other structure designed to house or secure within it any activity or property” must be restricted to “things of the same kind, character and nature as those specifically enumerated in 14-54(c)” under the doctrine of *ejusdem generis*. For the following reasons, we must agree with defendant and affirm the order.

“In the construction of statutes, the *ejusdem generis* rule is that where general words *follow* a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.” *State v. Fenner*, 263 N.C. 694, 697-98, 140 S.E. 2d 349, 352 (1965) (emphasis original). *Accord*, *State v. Lee*, 277 N.C. 242, 176 S.E. 2d 772 (1970).

“Building” commonly has been defined as

a constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) . . .

Webster’s Third New International Dictionary (1968 ed.) 292. The “particular designations” in the G.S. 14-54(c) definition of “building,” “dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling

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house," indicate that the legislature intended the statute to proscribe breaking or entering into that which conforms to the common definition. The statutes predating the present G.S. 14-54 also support this construction of its coverage, restricting the statute to that which has—or is intended to have—one or more walls and a roof.

The original 1875 statute proscribed breaking into "a storehouse where any merchandise or other personal property is kept, or any uninhabited house . . ." 1874-75 N.C. Sess. Laws c. 166, § 1. By 1883, the statute made additional "particular designations," including a "dwelling house" and "any uninhabited house," as follows: "a store-house, shop, ware-house, banking-house, counting-house, or other building, where any merchandise, chattel, money, valuable security, or other personal property shall be . . ." 1 Code of North Carolina § 996 (1883). The statute remained essentially unchanged until 1969, when G.S. 14-54(c) appeared in its present form. *See* 1 Rev. of North Carolina § 3333 (1905); 1 Consol. Stat. of North Carolina § 4235 (1919); 1969 N.C. Sess. Laws, c. 543, § 3,

Thus, since the legislature always intended "building" to be restricted to that which has—or is intended to have—one or more walls and a roof, its common definition, the things covered by the general phrase in G.S. 14-54(c), "any other structure designed to house or secure within it any activity or property," must be of a like nature, or *ejusdem generis*. Clearly, this definition of "building" and a "fenced-in area" are not *ejusdem generis*. Although a fence may have the characteristics of a wall, it does not have a roof. A "fenced-in area" therefore is not a "building" within the meaning of G.S. 14-54. We do not construe the evolution of the statute to expand its coverage of buildings protected from breaking or entering to that which is not *ejusdem generis*, as the State would suggest.

The order of the trial judge allowing defendant's motions to quash and dismiss the indictments is

Affirmed.

Judge BECTON concurs.

Judge HEDRICK dissents.

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Judge HEDRICK dissenting.

As pointed out by the majority, the trial judge, “[f]ollowing extensive findings of fact and conclusions of law, . . . allowed the motions to quash and dismiss the indictments.” The findings of fact merely detailed the procedure leading to the order and reiterated the allegations contained in the bills of indictment and the bills of particular, but under the section denominated “conclusions of law,” the trial judge elucidated on the rules of construing criminal statutes, divining legislative intent, the history of G.S. § 14-54, the definitions of various words and phrases in the statute and particularly the word “structure,” other statutes under which the defendants might have been prosecuted, the decisions in other jurisdictions relating to similar statutes, and even a law review article discussing statutory burglary and entitled *The Magic of Four Walls and a Roof*. The majority opinion appears to draw heavily from the trial judge’s ruminations, and in so doing, gives tacit approval not only to the procedure but to all of the substance contained in the section of the order characterized as “conclusions of law.” While I do not disagree with the rules discussed by the trial judge and the majority, I cannot agree with the procedure and the application of those rules in the present case.

Although G.S. § 14-54(c) defines a building to include “any other structure designed to house or secure within it activity or property,” the majority, asserting, “This is a case of first impression . . .,” uses Webster’s Third New International Dictionary’s definition of building in concluding that the bills of indictment fail to charge defendants with an offense under G.S. § 14-54. An appropriate definition of “structure” is found in *Watson Industries, Inc. v. Shaw*, 235 N.C. 203, 69 S.E. 2d 505 (1952): “A ‘structure’ is ‘something constructed or built.’ . . . ; that which is built or constructed; an edifice or a building of any kind; in the widest sense any product or piece of work artificially built up or composed of parts and joined together in some definite manner.” *Id.* at 207, 69 S.E. 2d at 509. [Citations omitted.] The majority, in my opinion, focuses too much on the physical composition of a limited part of the “fenced-in area,” and too little on the whole enclosure and its manifest purpose. To the majority, a roof is a determinative factor. The majority opinion indicates that a “fenced-in area” with a



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**Frady v. Groves Thread**

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roof is a structure within the meaning of the statute, and an area enclosed with four massive walls but with no roof is not.

A five and a half foot chain link fence comprises the north and east walls of the enclosure, and an extension of the same fence comprises only a portion of the south and west walls. The remainder of the south and west walls of the enclosure is comprised of the sixty and forty foot walls of a "metal building." The south and west walls of the "metal building" are extensions of the fence making the enclosure, and, conversely, the chain-link fence is merely an extension of the walls of the metal building. Significantly, the record before us does not disclose whether any portion of the compound, including the "metal building," is covered with a roof. It is obvious from the record, however, that the compound is "designed to house or secure within it . . . activity or property." Surely, the compound described in the bills of indictment and the bills of particular is a structure within the meaning of G.S. § 14-54(c), and one who breaks or enters such an area can at least be indicted and put on trial for more than misdemeanor trespass. I vote to reverse.

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GEORGE E. FRADY, EMPLOYEE, PLAINTIFF v. GROVES THREAD/GENERAL ACCIDENT INS. CO., AND/OR UNITED SPINNERS/HARTFORD INS. CO., EMPLOYERS, CARRIERS, DEFENDANTS

No. 8110IC1006

(Filed 16 February 1982)

**1. Master and Servant § 68— workers' compensation—disability from byssinosis—liability of employer at last injurious exposure**

Where plaintiff worked in cotton mills for some 23 years, plaintiff was then employed by defendant cotton processor for six months in 1966 and 1967, plaintiff was employed for the next six years by a synthetics processor, plaintiff became disabled in 1973 from byssinosis, a lung disease associated with cotton dust, there was evidence that plaintiff was already suffering from byssinosis symptoms when he went to work for defendant, and there was no evidence that employment in synthetics is associated with any occupational lung disease, defendant cotton processor is liable for plaintiff's full disability as his employer at the time of his last injurious exposure. G.S. 97-57.

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**2. Master and Servant § 68— workers' compensation—time of permanent disability**

Testimony by plaintiff and by the examining physician regarding plaintiff's inability to work after 1973 provided sufficient support for a determination by the Industrial Commission that plaintiff became permanently disabled in 1973, although evidence that plaintiff was employed for two brief periods in 1978 might have supported a contrary finding.

**3. Master and Servant § 68— workers' compensation—disability from byssinosis—allocation between occupational and non-occupational causes not required**

The Industrial Commission did not err in finding that plaintiff was totally disabled due to exposure to cotton dust when the examining physician testified that plaintiff's lung condition was attributable about 50% to cigarette smoking, about 40% to cotton dust, and about 10% to synthetic dust and bronchial infections where the Commission found upon supporting evidence that, notwithstanding any non-occupational medical problems plaintiff might have had, he would have suffered no impairment of earning capacity but for his exposure to cotton dust.

**4. Master and Servant § 68— workers' compensation—disability from byssinosis—injurious exposure to cotton dust**

Evidence of plaintiff's exposure to some cotton dust over a period of several months during his employment with defendant, although in smaller quantities than in his former employments, and his subsequent disability due to byssinosis was sufficient to support a finding that plaintiff suffered injurious exposure during his employment with defendant.

**5. Master and Servant § 68— workers' compensation—disability from byssinosis—benefits based on wages at time of disability**

Although plaintiff was last employed by defendant employer in 1967, he was entitled to benefits for disability from byssinosis based on the wages he was earning from another employer when he became disabled in 1973. G.S. 97-2(5); G.S. 97-52.

APPEAL by plaintiff and defendants Groves Thread Company and General Accident Insurance Company from the North Carolina Industrial Commission. Opinion and Award entered 10 December 1980. Heard in the Court of Appeals 8 January 1982.

This action involves a claim by plaintiff for disability benefits under the Workers' Compensation Act for work related respiratory disease. Defendants are two of plaintiff's former employers and their insurers. Plaintiff and defendant Groves Thread are appealing.

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*Hassell, Hudson & Lore, by Charles R. Hassell, Jr., for plaintiff appellee/cross-appellant.*

*Kennedy, Covington, Lobdell & Hickman, by William C. Livingston, for defendant appellants/cross-appellees.*

*Hatcher Kincheloe, Edward L. Eatman, Jr., and James F. Wood, III, for defendant appellees.*

ARNOLD, Judge.

Plaintiff was born in 1926 and began working in textile mills at the age of seventeen. For the next 23 years, he worked almost exclusively for Textiles, Inc., in the twisting departments of various cotton mills. In 1966, plaintiff was employed by defendant Groves Thread Company, another cotton processor, and worked as a twisting department employee for about six months during the period between 4 November 1966 and 2 August 1967. For the next six years, plaintiff was employed by defendant United Spinners Company, a synthetics processor.

While plaintiff had begun to experience breathing problems as early as 1958, he did not become disabled for purposes of the Act until 1973 since his earning capacity was not impaired until that date. *Watkins v. Central Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). Expert medical testimony indicated that plaintiff was suffering from symptoms of byssinosis, a lung disease associated with cotton dust. Plaintiff's lung condition was aggravated by cigarette smoking and by the dusty work environment at United Spinners to such an extent that the examining physician estimated plaintiff's condition was attributable about 50% to cigarette smoking, about 40% to cotton dust, and about 10% to synthetic dust and bronchial infections.

The deputy commissioner entered judgment and award for plaintiff, holding defendant Groves Thread Company liable for plaintiff's full disability as his employer at the time of his last injurious exposure. Plaintiff and Groves Thread appealed to the Full Commission, which adopted the deputy commissioner's award.

[1] Plaintiff's first assignment of error concerns the Commission's determination that his last injurious exposure occurred while he worked for Groves Thread Company. Plaintiff

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notes that G.S. 97-57 assigns liability to the employer in whose employment the plaintiff suffered his "last injurious exposure" without regard for the length of time of that employment or the degree of injury suffered in that employment. He argues that the Commission's finding of fact no. 14, that ". . . there is no indication that plaintiff's byssinosis was contributed to or augmented to the slightest degree by exposure to only synthetic dust . . .," is unsupported by the evidence. Plaintiff contends that the Commission should have found his last injurious exposure to have been his employment at United Spinners, not his earlier employment at Groves Thread Company.

We agree that there is uncontroverted medical evidence in the record establishing that plaintiff's exposure to synthetic dust "played a part in his current condition." However, we find this error harmless as a matter of law since the record reveals no evidence whatsoever that employment in synthetics is associated with any occupational lung disease.

Plaintiff's confusion as to the basis for assigning employer liability where several factors have contributed to the plaintiff's disability is understandable. He has correctly stated the statutory rule that where an employee becomes disabled due to an occupational disease, and this disability is the cumulative result of multiple employments,

. . . the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . . shall be liable. G.S. 97-57.

This was the rule under which the Commission assigned liability for plaintiff's disability to Groves Thread Company in spite of evidence that plaintiff was already suffering from byssinosis symptoms when he went to work for Groves, and that plaintiff was employed by Groves for only a few months, during which time he suffered relatively little injurious exposure. Inequitable as this result may be on the facts of this case, the rule serves to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employments to a plaintiff's occupational disease. The possibility that some employers may bear a disproportionate share of the total liability for occupational disease is a problem for the legislature, not the

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courts, to consider. *See Haynes v. Feldspar*, 222 N.C. 163 at 170, 22 S.E. 2d 275 (1942).

Where plaintiff's confusion apparently arises is in the meaning of "last injurious exposure" for purposes of the statute. It is true that an employer must take his employee as he finds him, and that the employer will be liable for the full extent of the employee's compensable injury even where a pre-existing condition substantially contributes to the degree of the injury. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). The threshold requirement for *any* liability to attach, however, is the occurrence of a compensable injury. The issue here, as it relates to the United Spinners, is not the proper degree of defendant's liability, but the existence of any basis for liability at all. We find that there is none since plaintiff does not suffer from an occupational disease associated with *this* employer's business. While plaintiff's condition apparently was compounded by his employment with United Spinners, this does not fulfill the requirement that the disability be "aggravated or accelerated by an occupational disease, or by an injury by accident arising out of and in the course of the employment." *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982). (Emphasis added.) An essential element of an occupational disease is that the "disease [be] due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed. . . ." *Morrison v. Burlington Industries*, 304 N.C. 1, 12, 282 S.E. 2d 458, 466 (1981). (Emphasis added.) In the present record, there is no evidence to indicate that the dusty conditions at United Spinners were peculiar to synthetics manufacture, or that they exposed employees to a risk of disease to which the general public is not exposed. Absent such evidence, there is no basis for liability.

[2] Plaintiff's remaining assignment of error concerns the correctness of the Commission's finding that he became permanently disabled in 1973. While evidence that plaintiff was employed for two brief periods in 1978 might have supported a contrary finding, the testimony of the examining physician and plaintiff's own testimony regarding his inability to work after 1973 provide sufficient support of the Commission's factual determination. Findings of fact by the Commission are conclusive on appeal if supported

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by competent evidence. *Inscoc v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). Thus we find no error.

[3] Defendant Groves Thread Company, as its first assignment of error, contends the deputy commissioner erred in finding that plaintiff was totally disabled due to exposure to cotton dust. Relying on our Supreme Court's holding in *Morrison v. Burlington*, *supra*, Groves argues that where undisputed evidence attributes plaintiff's condition to a combination of occupational and non-occupational causes, the Commission is required to determine the portions of plaintiff's disease attributable to non-occupational causes. Groves contends that medical testimony showing that the condition of the plaintiff was due at least 50% to smoking brings the case within the scope of *Morrison* and entitles plaintiff to no more than 50% disability. While *Morrison* does stand for the principle that an employee's disability may be properly allocated between work related and non-work related infirmities, we feel Groves' reliance on *Morrison* is misplaced. The most obvious distinction between *Morrison* and the case at bar lies in the effect of the presumption favoring the Commission's findings of fact. In *Morrison*, the Commission had found as fact that the employee's disability resulted from two independent causes, only one of which was work related. The Supreme Court held that it was "bound by these findings though there [was] evidence to the contrary." 304 N.C. 1, 6, 282 S.E. 2d 458, 465 (1981). Similarly, we are bound by the Commission's findings here unless there exists no competent evidence in support thereof. Groves is correct, of course, in its assertion that plaintiff's *condition* had more than one cause. However, the issue here is not the extent to which the employee's medical condition was due to occupational causes, but rather the extent to which his *disability* was so caused. There was evidence from which the Commission might have found that the plaintiff was partially disabled by non-occupational causes such as cigarette smoking. Had the Commission so found, we would agree with defendants that allocation between occupational and non-occupational causes would be required and that plaintiff would be entitled to recover only that portion of his disability which was occupationally caused. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). However, there was also evidence to support the Commission's determination that notwithstanding any non-occupational medical problems plaintiff might have had,

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he would have suffered no impairment of earning capacity but for his exposure to cotton dust. Absent impairment of an employee's earning capacity, there is no disability for purposes of the statute. *Watkins v. Motor Lines, supra*. Thus, the Commission correctly held, based on its conclusion that cotton dust exposure was the sole cause of plaintiff's disability, that he was entitled to maximum recovery. Indeed, a contrary holding would fly in the face of the established rule of law that a defendant must take the plaintiff as he finds him. While the Commission's findings and conclusions could be stated more clearly and logically, we find no prejudicial error.

[4] Groves also argues that the Commission erred in finding that plaintiff suffered injurious exposure during his employment with Groves because there was no evidence that his condition worsened during that period. Although Groves' wet-twist process was designed to reduce the concentration of cotton dust in the air, there was evidence that plaintiff was still exposed to some cotton dust in his employment with Groves, albeit in smaller quantities and over a shorter period of time than in his former employments. Since byssinosis is a disease caused by the cumulative effect of exposure to cotton dust over a long period of time, this evidence was sufficient to fulfill the statutory requirement of exposure to the hazards of occupational disease. The only remaining question is whether the exposure at Groves was "injurious." We hold that plaintiff's exposure over a period of several months to the hazards of byssinosis and his subsequent disability due to byssinosis are sufficient to support a finding that the exposure was injurious. See *Haynes v. Feldspar, supra, Willingham v. Bryan Rock and Sand Co.*, 240 N.C. 281, 82 S.E. 2d 68 (1954).

[5] Finally, Groves argues that the wording of the statute in effect in 1973 limits plaintiff to recovery based on his wages in the employment "in which he was working at the time of injury." G.S. 97-2(5). This is true. However, G.S. 97-52 explains that "[d]isablement or death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident. . . ." Thus, since the time of injury is the time of disability in the case of occupational disease, plaintiff is entitled to benefits based on the wages he was earning in 1973, the year he became disabled. We find Groves' argument that it is being penalized un-

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fairly for plaintiff's injury subsequent to his employment with Groves unpersuasive. The situation here is analogous to that in which plaintiff is injured in a non-work related accident as a direct result of an earlier, work related accident. This Court has held the employer liable for the second injury on those facts even where the original injury was not the *sole* cause of the second. *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 175 S.E. 2d 342 (1970). The case at bar is comparable to *Starr* in that plaintiff suffered disability (*i.e.* injury) in 1973 as a direct and natural result of his earlier injurious exposure to cotton dust. As the last employer in whose employment plaintiff was so exposed, Groves Thread Company is statutorily liable.

Any error in the opinion and award of the Industrial Commission was not prejudicial.

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

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FRED GUTHRIE, JR. AND KATHY GUTHRIE v. NORTH CAROLINA STATE  
PORTS AUTHORITY

No. 813SC409

(Filed 16 February 1982)

**State § 5— State Ports Authority—agency of State**

The superior court judge erred in failing to dismiss plaintiff's claim against defendant as the defendant, State Ports Authority, is an agency of the State of North Carolina and, as such, actions in tort against it must be instituted pursuant to the North Carolina Tort Claims Act.

APPEAL by defendant from *Brown, Judge*. Order entered 12 March 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 8 December 1981.

Plaintiff Fred Guthrie, Jr. seeks damages for injuries sustained by him while working as a forklift operator in a warehouse owned and operated by defendant. Plaintiff Kathy Guthrie seeks damages for loss of consortium. These causes of action were brought in superior court on 7 November 1980.



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On 2 December 1980, defendant filed motions to dismiss these actions under G.S. 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6), for lack of jurisdiction over the subject matter, lack of jurisdiction over the person, and failure to state a claim upon which relief can be granted, respectively. The grounds for defendant's Rule 12(b)(1) and Rule 12(b)(2) motion were that it is an agency of the State of North Carolina, and that as such, actions in tort against it must be instituted pursuant to the North Carolina Tort Claims Act [hereinafter referred to as the Act].

Following detailed findings of fact, the trial judge concluded, in part, that

1. The parties herein are properly before the court and the court has jurisdiction over this cause.

. . . .

2. The defendant is not entitled to claim the defense of sovereign immunity in this cause.

. . . .

3. The North Carolina State Tort Claims Act, G.S. 143-291, et seq. is not applicable to the claim alleged herein by the plaintiffs.

Defendant's motions to dismiss therefore were denied. Defendant appeals from this order.

*Bennett, McConkey & Thompson, by Thomas S. Bennett and James W. Thompson III, for plaintiff-appellees.*

*Stith & Stith, by F. Blackwell Stith, for defendant-appellant.*

HILL, Judge.

This appeal arises from the trial judge's denial of defendant's motions to dismiss. "Ordinarily, there is no right of appeal from the refusal of a motion to dismiss. The refusal to dismiss the action generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment." *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 573, 253 S.E. 2d 362, 364 (1979). Although appeal from an order denying motions to dismiss is fragmentary, our cases allow "the appellate courts [to] entertain an appeal from [such an order] in some cases and *elect*

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to review some cases on their merits . . .” *Shaver v. N. C. Monroe Construction Co.*, 56 N.C. App. 68, 69, 283 S.E. 2d 526, 527 (1981) (emphasis original). Thus, because of the importance of the question presented and our ultimate disposition, we elect to review this case on its merits.

The sole question for our review is whether defendant is an agency of the State of North Carolina under the Act, G.S. 143-291, such that tort claims against it must be instituted exclusively in the Industrial Commission. For the following reasons, we hold that defendant is an agency of the State under the Act, plaintiffs’ claims are applicable to the Act, and the trial judge’s conclusions of law to the contrary are not supported by his findings of fact.

The Act states that “[t]he North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Department of Transportation, and all other departments, institutions and *agencies of the State*.” G.S. 143-291 (emphasis added). Generally, our cases have not been very helpful in construing the emphasized portion of the statute, except to say that “[t]he Tort Claims Act embraces claims only against State agencies.” *Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E. 2d 530, 535 (1968). See also *Wirth v. Bracey*, 258 N.C. 505, 128 S.E. 2d 810 (1963). However, in *Turner v. Gastonia City Board of Education*, 250 N.C. 456, 463, 109 S.E. 2d 211, 216 (1959), our Supreme Court stated the following:

Under the ordinary rules of construction, “departments, institutions, and agencies of the State.” must be interpreted in connection with the preceding designation, “State Board of Education and State Highway & Public Works Commission.” Where words of general enumeration follow those of specific classification, the general words will be interpreted to fall within the same category as those previously designated. The maxim *ejusdem generis* applies especially to the construction of legislative enactments. It is founded upon the obvious reason that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted.

In this light, we will compare the organization and powers of the State Board of Education and the Department of Transportation

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with defendant to determine whether the three are *ejusdem generis*.

"The State Board of Education shall consist of the Lieutenant Governor, the State Treasurer, and 11 members appointed by the Governor, subject to confirmation by the General Assembly in joint session." G.S. 115C-10. The Governor may fill vacancies on the Board for unexpired terms without legislative confirmation. *Id.* G.S. 115C-12 vests in the State Board of Education "[t]he general supervision and administration of the free public school system . . . ." For its financial powers, "[t]he Board shall have general supervision and administration of the educational funds provided by the State and federal governments," excepting certain local funds. G.S. 115C-408. Specifically, the State Board of Education has the power or duty, *inter alia*, to alter the boundaries of certain administrative units, to appoint a controller to manage the fiscal affairs of the public school fund, to apportion State and federal school funds, to provide for certain programs or projects, to purchase liability insurance, and to provide certain school personnel functions. *See generally* G.S. 115C-12. The superintendent of public instruction, elected to a four year term by the qualified voters of the State, is the chief administrative officer of the State Board of Education. G.S. 115C-18 and -19.

"The general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law." G.S. 143B-346. The Board of Transportation, however, is the department's governing body analogous to the State Board of Education. "The Board of Transportation shall have 21 members appointed by the Governor. . . . The Governor shall have the authority to remove for cause sufficient to himself, any member appointed by the Governor." G.S. 143B-350(c). Two additional members are appointed, one from the membership of the Senate by the Lieutenant Governor, and one from the membership of the House of Representatives by the Speaker of the House of Representatives. G.S. 143B-350(d). "Vacancies in each office shall be filled by the incumbent of the office making the appointment to the Board." *Id.* The Secretary of Transportation is an *ex officio* member and chairman of the Board of Transportation. G.S. 143B-350(b). G.S. 143B-350(e) allows the Board of

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Transportation to meet "at any place in the State" as it may provide. "The Board shall carry out its duties consistent with the needs of the State as a whole and it shall not sacrifice the general statewide interest to the purely local desires of any particular area." G.S. 143B-350(a). Specifically, the Board of Transportation has the powers and duties, *inter alia*, to "formulate policies and priorities for all modes of transportation under the Department of Transportation," to ascertain transportation needs, to schedule transportation improvement projects, to advise the Secretary of Transportation, "[t]o allocate all highway construction and maintenance funds appropriated by the General Assembly as well as federal-aid funds which may be available," to review and approve highway construction projects and programs, to award all highway construction contracts, and to authorize the acquisition of rights-of-way for highway improvement projects. *See generally* G.S. 143B-350(f).

The North Carolina State Ports Authority, defendant herein, was created by G.S. 143B-452.

It shall be governed by a board composed of nine members and hereby designated as the authority. . . . The Governor shall appoint seven members to the Authority, the Lieutenant Governor shall appoint one member and the Speaker of the House of Representatives shall appoint one member.

. . . The members of the Authority appointed by the Governor shall be selected from the state-at-large and insofar as practicable shall represent each section of the State in all of the business, agriculture, and industrial interests of the State.

*Id.* The Governor, the Lieutenant Governor, and the Speaker of the House of Representatives may fill vacancies created by their own appointments. Further, the North Carolina State Ports Authority may meet "at any place within the State" as it may provide. *Id.*

*Through the Authority hereinbefore created, the State of North Carolina may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, or within the jurisdiction of the State, and works of internal improvements incident*

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thereto, including the acquisition or construction, maintenance and operation at such seaports or harbors of watercraft and highway and bridges thereon or essential for the proper operation thereof. *Said Authority is created as an instrumentality of the State of North Carolina for the accomplishment of [its] . . . purposes . . .*

G.S. 143B-453 (emphasis added). To carry out its purposes, the North Carolina State Ports Authority has the powers of a body corporate—"including the power to sue and be sued [and] to make contracts . . ." G.S. 143B-454(1). It also has the power to acquire or dispose of real or personal property, to maintain structures useful in the aid of commerce, to establish an office with personnel as the Secretary of Commerce deems necessary, to pay for its formation and organization, and to apply for and accept loans from the State or federal government or other sources,

provided, however, that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State of North Carolina, or any political subdivisions thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina, or any political subdivision thereof: Provided, however, at no time may the total outstanding indebtedness of the Authority, excluding bond indebtedness exceed a total of five hundred thousand dollars (\$500,000) without approval of the Advisory Budget Commission . . .

G.S. 143B-454(9). *See generally* G.S. 143B-454. In addition, any acquisition or disposition of real property by the North Carolina State Ports Authority, as noted above, is subject to the prior review and approval by the Governor and Council of State. G.S. 143B-455. Although the North Carolina State Ports Authority is empowered to issue negotiable revenue bonds which are not deemed to constitute a debt of the State, G.S. 143B-456(h), such bonds can be issued only with the approval of the Advisory Budget Commission. G.S. 143B-456(b).

The foregoing comparison of the organization and powers of the State Board of Education and the Department of Transportation, explicitly under the Act, with defendant yields similarities in three major areas. First, in each instance, the members are appointed by the Governor and other government officials who also

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have the power to fill vacancies in the memberships. *See* G.S. 115C-10; 143B-350(c) and (d); 143B-452. Second, although each entity has certain independent fiscal responsibilities, the ultimate control over funding lies with the State, whether it be the General Assembly or the Advisory Budget Commission. *See* G.S. 115C-408; 143B-350(f)(7); 143B-454(9). Third, each entity is statutorily authorized to conduct its specific functions on behalf of the State of North Carolina. *See* G.S. 115C-12; 143B-350(a). Significantly, G.S. 143B-453, quoted *supra*, states that defendant is an "instrumentality of the State."

Even though its act of creation has the effect of rendering defendant "a substantially independent and autonomous public or quasi-municipal corporation," as plaintiffs state, neither this description nor defendant's "proprietary function" erase its substantial ties to the State of North Carolina as indicated above. *See generally The News & Observer Publishing Co. v. Wake County Hospital Systems, Inc.*, 55 N.C. App. 1, 284 S.E. 2d 542 (1981). Thus, since the State Board of Education, the Department of Transportation, and defendant have similar ties to the State through their organization and powers, we find that they are *ejusdem generis*.

Defendant is an agency of the State of North Carolina under the Act; its liability, if any, must be determined by the Industrial Commission. The order of the trial judge denying defendant's motions to dismiss is

Reversed.

Judges VAUGHN and WEBB concur in result.

Judges VAUGHN and WEBB concurring.

We concur in the result reached in this case, but we do not agree with all the reasons advanced therefor. We believe our Supreme Court has held that the North Carolina State Ports Authority is a state agency. *See Nat Harrison Associates, Inc. v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972). We believe we are bound by this holding. We vote to reverse for this reason.

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**State v. Keyes**

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**STATE OF NORTH CAROLINA v. JOHNNY LEE KEYES**

No. 8119SC432

(Filed 16 February 1982)

**1. Criminal Law § 141—habitual felon—allegations in principal felony indictment**

An indictment alleging habitual felon status was not subject to quashal because the principal felony indictment did not refer to defendant's alleged status as an habitual offender.

**2. Criminal Law § 141—habitual felon proceeding—empanelment of jury**

Defendant was not prejudiced by failure of the court officially to re-empanel the jury, if that were necessary, prior to the beginning of an habitual felon proceeding.

**3. Constitutional Law § 46—refusal to permit withdrawal of appointed counsel—reappointment of counsel for appeal**

Defendant was not denied the effective assistance of counsel by the trial court's refusal to permit appointed counsel to withdraw on the day of trial because counsel believed that defendant would testify and perjure himself, and the trial court did not abuse its discretion in reappointing counsel to prosecute defendant's appeal, where the record shows that defendant was well represented in his trial and on appeal.

**4. Criminal Law § 66.5—pretrial identification procedure—no right to counsel**

Defendant had no right to counsel when he was brought to a convenience store for identification by a store employee some 30 minutes after the employee had been robbed where the case was still in the investigatory stages and defendant had not been charged with anything at the time officers took him to the store.

**5. Criminal Law § 66.6—pretrial showup not unduly suggestive**

A pretrial identification procedure at which defendant was identified by an employee of a convenience store which had been robbed while sitting in a patrol car outside the store was not so unduly suggestive as to offend due process requirements where the robbery occurred only 30 minutes before the identification; the employee had seen defendant in the store prior to the time of the robbery; the employee gave defendant money from both a safe and the cash register during the robbery; the store was well lighted and the employee could see defendant well; and the employee, having been told by his employer not to try to be a hero but just to get a good description, observed defendant closely.

**6. Criminal Law § 128.2—newspaper articles—denial of mistrial**

The trial court did not err in refusing to declare a mistrial because two jurors had seen the headline of a newspaper article about prosecution of defendant as an habitual felon where the court determined that neither juror had read the article, the court ruled that seeing the headline did not violate instructions not to read anything about the case, and the court again instructed

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the jury not to read about the case and to disregard anything that the jurors might have seen.

APPEAL by defendant from *Wood, Judge*. Judgment entered 5 December 1980, Superior Court, ROWAN County. Heard in the Court of Appeals 14 October 1981.

Defendant was charged by indictment dated 8 September 1980 with armed robbery and by indictment dated 3 November 1980 with having committed the "robbery . . . while an habitual felon; he having been convicted of or having entered a plea of guilty to three felony offenses in the Superior Court of Rowan County." He was found guilty of armed robbery, and the jury returned a verdict adjudging him to be an habitual felon. From entry of judgment imposing a sentence of twenty to twenty five years, defendant appealed. Facts necessary for decision are set out in the opinion.

*Attorney General Edmisten, by Assistant Attorney General J. Chris Prather, for the State.*

*Kenneth L. Eagle for defendant appellant.*

MORRIS, Chief Judge.

[1] Defendant brings forward and argues twenty of his twenty-three assignments of error and combines them into fifteen arguments.

He first contends that the court committed reversible error in failing to quash the indictment and dismiss the habitual felon prosecution. Defendant takes the position that because the principal felony indictment did not refer to his alleged status as an habitual offender, the indictment alleging habitual offender status must be quashed and that prosecution dismissed. We disagree.

The Habitual Felons Act provides in pertinent part as follows:

§ 14-7.1. Persons defined as habitual felons.—Any person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon.

§ 14-7.2. Punishment.—When any person is charged by indictment with the commission of a felony . . . and is also charged with being an habitual felon as defined in § 14-7.1, he must,



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upon conviction, be sentenced and punished as an habitual felon, as in this chapter provided, except in those cases where the death penalty is imposed.

§ 14-7.3. Charge of Habitual Felon.—An indictment which charges a person who is an habitual felon within the meaning of § 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.

. . . .

§ 14-7.5. Verdict and Judgment.—When an indictment charges an habitual felon with a felony as above provided and an indictment also charges that said person is an habitual felon as provided herein, the defendant shall be tried for the principal felony as provided by law. The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony. . . . If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. Except that the same jury may be used, the proceedings shall be as if the issue of habitual felon were a principal charge. If the jury finds that the defendant is an habitual felon, the trial judge shall enter judgment according to the provisions of this article.

§ 14-7.6. Sentencing of habitual felons.—When an habitual felon as defined in this chapter shall commit any felony under the laws of the State of North Carolina, he must, upon conviction or plea of guilty under indictment in form as herein provided . . . be sentenced as an habitual felon; and his punishment must be fixed at a term of not less than 20 years in the State prison nor more than life imprisonment. . . .

*State v. Allen*, 292 N.C. 431, 432, 233 S.E. 2d 585, 586-87 (1977).

In *State v. Allen*, supra, the Court discussed this Act noting that proper construction of the Act contemplates that when a person who has attained habitual felon status is indicted for the com-

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mission of another felony, he may also, in another bill, be charged with being an habitual felon. The Court noted that there are currently in this country three recidivist type procedures by which sentences, otherwise statutorily appropriate for a given felony, may be increased. One type requires the allegation of recidivism in the indictment charging the principal offense, and the same jury tries both. Another type of procedure is a supplemental proceeding in which a multiple offender charge is filed after conviction for the substantive offense. If, in that proceeding, defendant is found to be a multiple offender, the sentence given for the substantive offense may be vacated and a longer sentence imposed. The third type is that contemplated by the North Carolina Habitual Felon Act. "This type proceeding requires the indictment or information charging the defendant to be separated into two parts, the first alleging the present, or substantive crime, and the second alleging defendant's recidivist status." *Id.* at 434. This was done in this case. Defendant's interpretation of the statutory requirements could indeed result in prejudice to the defendant. The statute requires that defendant be tried on the substantive offense first. Not until he is convicted of the offense charged can the presence of the habitual felon indictment be revealed to the jury. The defendant has notice that he is being charged as an habitual offender before he pleads to the present offense. The possibility of his entering a guilty plea on the expectation that the maximum punishment would be that provided in the statute for that offense is eliminated. We do not believe the legislature intended to require that the first indictment, notifying defendant of the substantive charge, should include his recidivist status. That is the function of the second indictment. Nor can we sustain defendant's suggestion that the Act cannot pass constitutional muster. See *Rummel v. Estelle*, 445 U.S. 263, 63 L.Ed. 2d 382, 100 S.Ct. 1133 (1980); *Spencer v. Texas*, 385 U.S. 554, 17 L.Ed. 2d 606, 87 S.Ct. 648 (1967); *State v. Allen*, *supra*. This assignment of error is overruled.

[2] Defendant next contends that the delay in empanelling the jury at the habitual felon proceedings constituted reversible error for that G.S. 15A-1221 requires that the jury be empanelled prior to the state's offering evidence, and G.S. 14-7.5 requires that, "except that the same jury may be used, the proceedings shall be as if the issue of habitual felon were a principal charge." Defendant

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accurately sets out the statutory provisions, and if a question of double jeopardy were involved, we would probably agree with him. However, that is not the case here. We perceive no prejudice to defendant by the failure of the court officially to re-empanel the jury, even if that were necessary, prior to the beginning of the proceedings. If error was committed, it was technical error. Mere technical error is not sufficient to require the granting of a new trial. The error must be so prejudicial as to affect the result. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976); G.S. 15A-1443(a). This assignment of error is also overruled.

[3] Counsel for defendant, on the day of trial, attempted to withdraw because he believed that defendant would testify and perjure himself. He urges that the court's refusal to allow him to withdraw constituted a denial of effective assistance of counsel to defendant. Upon defendant's notice of appeal, the court reappointed counsel to prosecute defendant's appeal. This, he urges, was an abuse of discretion. From the record before us it is abundantly clear that defendant was quite well represented. It is also clear that the court did not abuse his discretion and that the defendant suffered absolutely no prejudice. We commend counsel for his candor in bringing these matters before us, but we cannot sustain the position, and we overrule these assignments of error.

Defendant next contends that the court committed reversible error in admitting evidence of the out-of-court and in-court identification of defendant by the witness Everett Body. He bases this contention on two premises: (1) that at the time of the identification, defendant did not have counsel, and (2) that the procedure used was unduly suggestive. Neither position can be sustained. Witness Body, an employee of Hop In, Incorporated, testified that between 11:00 p.m. on 22 July and 7:00 a.m. on 23 July, he saw defendant twice. The first time defendant came in the store, witness was talking with a police officer who was in the store. Defendant got a pie, checked out, and left. The police officer left, and in about ten minutes defendant came in again. Witness was putting drinks in the cooler. Defendant came over, got a Mountain Dew and told witness to check him. When witness looked up, defendant had a knife to witness's chest and demanded money. Defendant said he wanted the money in the safe, came around the counter holding the knife on witness all the time. The store was

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well lighted and witness could see defendant well. He gave defendant the money from the safe and the cash register. Defendant then, by use of the knife, forced witness to go back to the drink stand where defendant got a six pack. The witness, having been told by his employer not to try to be a hero but just to get a good description, observed defendant closely. Some 30 minutes later, defendant was brought to the store by officers and witness went out to the patrol car where defendant was seated and, without encouragement from the officers, said that he was the man who had robbed him.

[4] Defendant had not been charged with anything at the time the officers took him to the Hop In store. It was still the investigatory stages of the incident. At this stage, there was obviously no right of counsel, nor was it required that a knowing and voluntary waiver of counsel be obtained. In *State v. Sanders*, 33 N.C. App. 284, 287, 235 S.E. 2d 94, 96 (1977), *cert. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977), we said:

The constitutional right to counsel at an identification procedure does not attach until "the initiation of adversary *judicial* criminal proceedings whether by way of formal charge, preliminary hearing, indictment or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1977) (emphasis added). *See, State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974).

[5] Since there was no right of counsel, therefore no abridgement of a constitutional right, the identification evidence need not be excluded for that reason. Nor was the procedure so unduly suggestive as to offend due process requirements. The factors to be considered when making a determination of whether the "totality of circumstances" surrounding the procedure was so unduly suggestive as to create a substantial likelihood of misidentification are: the witness's opportunity to observe the defendant at the time the crime was committed, his attentiveness, the accuracy of his description, the length of time elapsing between the time of the commission of the crime and the identification procedure, and the degree of the witness's certainty. *See Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972). Applying these factors to the case before us, it is perfectly clear that the evidence of identification was admissible. The court found facts

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which were fully supported by the evidence and which supported his conclusions. This assignment of error is overruled.

[6] During the course of the trial it was brought to the court's attention that the newspaper the day before had carried an article about the habitual felon prosecution. The court had instructed the jury at the time the court was recessed for the day that they were not to discuss the case, listen to anything about it on radio or television, or receive anything about the case outside the courtroom. The court questioned the jurors and determined that two had seen the headline to the article but neither had read the article. The court ruled that seeing the headline did not violate his instructions and again instructed the jury not to read anything about the case and to disregard anything they might have seen. Defendant's motion for mistrial was denied and he assigns this as error. It is well established that, absent a finding of substantial and prejudicial error (see G.S. 15A-1061), the granting or denial of a motion for mistrial lies in the sound discretion of the trial judge. *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19 (1957); *State v. Mills*, 39 N.C. App. 47, 249 S.E. 2d 446 cert. denied, 296 N.C. 588, 254 S.E. 2d 33 (1978); *Thompson v. Town and Country Construction Co.*, 39 N.C. App. 240, 249 S.E. 2d 810 (1978). There is no showing of substantial prejudice to defendant. We perceive no abuse of discretion in the ruling of the trial court. This assignment of error is without merit.

Each of the remaining assignments of error brought forward and argued by defendant has been examined with care. We find none with sufficient merit to require discussion. Counsel for defendant has been diligent in attempting to find error and has not overlooked any possibility. Defendant, however, represented by able counsel, had a fair trial free from prejudicial error.

No error.

Judges ARNOLD and BECTON concur.

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**Rathburn v. Hawkins**

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RAYMOND GERALD RATHBURN AND WIFE, MARY FRANCES RATHBURN v.  
DENVER C. HAWKINS AND WIFE, ZOLA MAE HAWKINS

No. 8128DC466

(Filed 16 February 1982)

**Adverse Possession §§ 2.6— right-of-way in driveway—issue of permissive use—  
summary judgment improper**

In an action to establish a prescriptive easement over defendants' property, the trial court erred in granting summary judgment for defendants as the forecast of plaintiffs' evidence was sufficient to show adverse possession, if a disputed permission issue can be resolved in plaintiffs' favor. The fact that the plaintiffs, as owners, have not shown adverse use for the statutory period of twenty years does not defeat their claim if they can offer proof that the requirement to establish prescriptive use existed in their predecessor in title.

APPEAL by plaintiffs from *Roda, Judge*. Judgment entered 30 January 1981 in District Court, BUNCOMBE County. Heard in the Court of Appeals 5 January 1982.

This is an appeal from summary judgment for defendants in an action to establish a prescriptive easement over defendants' property.

In their complaint plaintiffs alleged that they had adversely possessed a right-of-way over defendants' land for more than twenty years and prayed for judgment recognizing their ownership of the right-of-way. Defendants answered by denying plaintiffs' allegations and counterclaimed that plaintiffs used the driveway with defendants' permission which was withdrawn on 17 March 1980. Defendants also alleged trespass and nuisance for which they sought \$10.00 per day in damages and an injunction against such trespass.

Defendants moved for summary judgment. In support of their motion they offered the following: the depositions of both plaintiffs; the affidavit of defendant Denver C. Hawkins; and a copy of a deed dated 4 October 1960 from F. B. Short and wife to plaintiffs, recorded in Deed Book 836, page 503, Buncombe County Register of Deeds. At the hearing on the motion, plaintiffs offered into evidence the affidavit of plaintiff Raymond Gerald Rathburn.

In his affidavit defendant Denver Hawkins stated that since 1944 he and his wife had owned the land on which the driveway

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**Rathburn v. Hawkins**

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plaintiffs claim as a right-of-way is located. In late 1959 or early 1960 plaintiff Raymond Rathburn told defendant that he planned to buy property adjoining defendants' land and asked defendant if any right-of-way existed across defendants' property. Defendant advised Rathburn that there was no right-of-way but gave his permission for such use. By letter dated 17 March 1980 defendants withdrew this permission.

Plaintiff Gerald Rathburn's deposition and affidavit indicated that his house is at the terminus of the disputed driveway and that the driveway is the only access to his property. The house was built in the 1940's, and it appeared that the driveway had also been in existence since that time. Plaintiffs rented the house from the owner beginning in January 1960, bought the property in June or July 1960, and lived there until 1969. Since 1969 they have rented the house to various tenants. Plaintiffs have added gravel to the driveway each year since they have owned the property. The driveway is used exclusively by plaintiffs, their friends, neighbors and tenants. Defendants built a fence along the driveway in the 1960's. The location of the right-of-way is shown on a plat attached to a deed dated 22 June 1973 in which defendants conveyed part of their property.

According to plaintiff's affidavit, the only conversation between plaintiffs and defendants concerning the right-of-way occurred after a surveyor had placed a stake in the middle of the driveway. Mr. Hawkins stated that the right-of-way was further down the hill, and he and Mr. Rathburn discussed moving the driveway. However, Mr. Hawkins said, "'Since the right-of-way has always been in that location, let's just leave it there.'"

Plaintiffs thought they had a legal right-of-way over defendants' property and did not learn otherwise until they received the letter withdrawing defendants' permission to use the driveway. Both plaintiffs stated that they did not intend to take anything away from Mr. Hawkins.

The court granted summary judgment for defendants and enjoined plaintiffs from going over defendants' land. Plaintiffs appealed.

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**Rathburn v. Hawkins**

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*Riddle, Shackelford & Hyler by John E. Shackelford for plaintiff appellants.*

*Barnes, Wadford, Carter & Kropelnicki by Steven Kropelnicki, Jr., for defendant appellees.*

CLARK, Judge.

The sole issue before this Court is whether the trial court erred in granting summary judgment for defendants. G.S. 1A-1, Rule 56, provides that a motion for summary judgment is properly granted if the pleadings and other documents filed show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

An issue is material if the facts alleged "would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901 (1972).

In *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E. 2d 897, 900-01 (1973), the Supreme Court in a decision written by Huskins, J., traced the development in this State of the law concerning prescriptive easements. The decision enumerated the following legal principles applicable to prescriptive easements:

"1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement. . . .

2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. . . .

3. The use must be adverse, hostile, or under a claim of right. . . .

4. The use must be open and notorious. . . .

5. The adverse use must be continuous and uninterrupted for a period of twenty years. . . .

6. There must be substantial identity of the easement claimed. . . ." (all citations omitted)



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Rathburn v. Hawkins

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The facts in *Dickinson* are very similar to those of the case *sub judice*. In each case, the roadway was used continuously by the plaintiffs under such circumstances as to give defendants notice that the use was adverse, hostile or under claim of right; the roadway was the only means of access to the house on the property; the defendants had placed a fence (this case) and shrubbery and old tires (*Dickinson*) along the edge of the driveway; and plaintiffs had performed some maintenance on the roadway. Our Supreme Court held in *Dickinson* that the evidence was sufficient to rebut the presumption that the use was permissive and to submit the issue to the jury. See, *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981).

In the case before us the parties offered conflicting proof on the question of whether plaintiffs asked for permission to use the driveway. In *Dickinson*, however, there was no evidence that plaintiff had ever sought or that defendants had ever given permission to use the roadway. Therefore, it is obvious that the conflicting evidence concerning permission to use the driveway is crucial to the outcome of the case here presented and must be resolved. The testimony of plaintiff and defendant is contradictory on this issue: Mr. Hawkins averred that plaintiff sought permission to use the roadway, which was granted; however, Mr. Rathburn denied that this conversation had in fact occurred. Therefore, it is for the trier of facts, not the court, to determine which party is to be believed. "[I]f there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 655, 268 S.E. 2d 190, 193-94 (1980). See also, *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

Based upon the decision in *Dickinson v. Pake*, *supra*, we believe that the forecast of plaintiffs' evidence was sufficient to show adverse possession, if the disputed permission issue can be resolved in plaintiffs' favor. The mere fact that defendants at the taking of the depositions were able to elicit from plaintiffs the statements that they had no intention of taking property from defendants is not in itself sufficient to negate adverse possession.

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**Chrysler Credit Corp. v. Belk**

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The evidence tended to show that plaintiffs adversely possessed the driveway under claim of right. This claim appears to have been recognized by defendants as shown by the plat attached to their deed to Abe Anders recorded in Book 1082, Page 738, Buncombe County Registry, on which the right-of-way is indicated, and also as acknowledged in the conversation between Mr. Hawkins and Mr. Rathburn concerning moving the location of the driveway.

We note that the plaintiffs as owners have not shown adverse use for the statutory period of twenty years. They became record title holders of the property in October 1960, and therefore they were about six months short of the requisite period at the time defendants' withdrew permission (March 1980). Since it appears from the record that the driveway has been in existence as long as has the house itself, this should pose no problem for plaintiffs. They, of course, can tack the possession of their predecessor in title (including plaintiffs' possession as tenants and agents of the owner) to their own use, as long as they offer proof at trial that the requirements to establish prescriptive use also existed in their predecessor. *Alexander v. Gibbon*, 118 N.C. 796, 24 S.E. 748 (1896); J. Webster, *Real Estate Law in North Carolina* § 262 (1971).

We conclude that summary judgment was improvidently entered because the record discloses a material issue of fact.

Reversed.

Judges WHICHARD and BECTON concur.

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CHRYSLER CREDIT CORPORATION v. HENDERSON BELK

No. 8126SC474

(Filed 16 February 1982)

**Bills and Notes § 20— action on promissory note—summary judgment improper**

In an action on a promissory note given pursuant to the liquidation of an automobile dealership, the trial court erred in entering summary judgment in favor of plaintiff where a genuine issue of material fact was presented as to

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whether plaintiff orally agreed with defendant's agent that \$20,000 due from plaintiff to the dealership would be applied to the initial payments owing on the note so that defendant would not be in default on the note.

APPEAL by defendant from *Johnson, Judge*. Judgment entered 18 February 1981, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 January 1982.

On 21 August 1980 plaintiff filed suit against defendant seeking to recover judgment on a promissory note executed by defendant to plaintiff on 6 June 1980, wherein defendant agreed to pay plaintiff the sum of \$66,780 on a monthly basis. The first installment, due 10 July 1980, was to be in the amount of \$6,071. Each remaining installment, due on the 10th of the succeeding month, was to be in the amount of \$6,070.90. The parties agreed "that this note represents the current amount owed Chrysler Credit Corporation (Plaintiff) due to the liquidation of Lincolnton Chrysler Dodge, Inc., an Automobile Dealership located in Lincolnton, North Carolina." Pursuant to the note plaintiff could declare the balance due if defendant defaulted on any of these payments. Plaintiff alleged in its complaint that defendant failed to make payments "as they became due and owing."

On 27 October 1980, defendant filed a verified answer, wherein he denied that the note was executed for value received and that he had failed to pay. Three days later plaintiff moved for entry of judgment on the pleadings, or in the alternative, for the entry of summary judgment in its favor. Plaintiff alleged, *inter alia*, that defendant's answer failed "to raise a valid defense with respect to the balance due and owing on the promissory note admittedly executed by the defendant."

During discovery, defendant admitted signing an agreement entitled "Continuing Guaranty" dated 11 May 1978. Therein defendant agreed to discharge all of the present and future obligations owing to plaintiff by Lincolnton Chrysler Dodge, Inc. (hereinafter the dealership). Defendant also admitted that he received a letter from plaintiff's attorney on 11 August 1980 demanding payment of the outstanding balance on the note. C. W. Robinson, plaintiff's Branch Manager, filed an affidavit on 12 November 1980. He swore that in June 1980 the dealership owed plaintiff money; that pursuant to the guaranty agreement be-

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tween plaintiff and defendant, defendant was liable for this debt and that defendant signed a promissory note in consideration of plaintiff's decision to allow the debt to be paid in installments. On 12 November 1980, defendant requested the production of certain documents by plaintiff including those relating to the relationship between the dealership and plaintiff and those regarding conversations by or between defendant, plaintiff or the dealership involving the promissory note. On 10 December 1980 plaintiff moved to amend its complaint in order to allege a second cause of action. This cause of action involved further debts allegedly accrued by the dealership and guaranteed by defendant.

On 6 February 1981, Frank Wilson filed an affidavit in defendant's behalf. Wilson swore that during 1980 he was vice-president of the dealership and authorized agent for defendant. He emphasized that his authority included acting on defendant's behalf in arranging for payments on the 6 June 1980 promissory note and other monies possibly owed by the dealership to plaintiff. Wilson further swore:

On or about July 2, 1980 I had a conversation with Bill Robinson of Chrysler Credit Corporation concerning monies owed by Lincoln (sic) Chrysler-Dodge, Inc. and Henderson Belk. I was advised by Bill Robinson that money due Lincoln (sic) Chrysler-Dodge, Inc. from Chrysler Corporation which was approximately \$20,000.00 would be applied to the initial payments due under the note of 6 June, 1980 owed by Henderson Belk to Chrysler Credit Corporation. Thereafter, I informed Mr. Belk that the initial payments due pursuant to the promissory note of June 6, 1980 were taken care of.

On 6 February 1980, defendant also moved to amend his answer and filed an amended answer and counterclaim. Therein he alleged the affirmative defense that all payments due plaintiff were paid pursuant to the terms of the promissory note.

On 9 February 1981, the trial court considered plaintiff's motion for leave to amend its complaint, motion of defendant to amend his answer and defendant's motion to compel discovery. The court allowed plaintiff's motion and allowed in part defendant's motion to compel discovery. The court denied defendant's motion to amend his answer. On the same date the court considered plaintiff's motion for summary judgment and concluded

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that there was no genuine issue as to any material fact. Defendant appeals from the judgment awarding summary judgment in plaintiff's favor.

*Fairley, Hamrick, Monteith & Cobb, by Laurence A. Cobb and F. Lane Williamson, for plaintiff appellee.*

*Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, by T. LaFontine Odom, for defendant appellant.*

MORRIS, Chief Judge.

Defendant has assigned error solely to the granting of plaintiff's motion for summary judgment. Defendant argues that he presented evidence at the summary judgment hearing which tended to show that he was not in default on the promissory note. The North Carolina Supreme Court has held that when unpleaded defenses (such as payment on a note) are later raised by the evidence, they should be considered when resolving a motion for summary judgment. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). In accord with *Gillespie*, this Court has emphasized that "the nature of summary judgment procedure (G.S. 1A-1, Rule 56), coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. (Citations omitted.)" *Cooke v. Cooke*, 34 N.C. App. 124, 125, 237 S.E. 2d 323, 324, *disc. rev. denied*, 293 N.C. 740, 241 S.E. 2d 513 (1977). In *Gillespie*, *supra*, defendant executed five demand notes to plaintiff. In his affidavit, defendant swore that the notes were executed contemporaneously with an oral agreement as to the mode of payment and the fund from which the notes would be paid. He further swore that he had been engaged in a course of dealings with plaintiff and its predecessor which was pursuant to the oral agreement. The Supreme Court held:

Defendant's evidence, when taken in the light most favorable to him, establishes the execution of certain notes and security instruments accompanied by a prior or contemporaneous parol agreement as to the mode of payment and the fund from which it would be paid. The evidence tending to show a continued course of dealings pursuant to this oral agreement was sufficient to have affected the result of the

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action, thereby creating a conflict between plaintiff's evidence and defendant's evidence as to a material fact. Thus, a jury question was presented and the trial judge erred when he granted plaintiff's motion for summary judgment.

*Gillespie* at 310, 230 S.E. 2d at 379-80. Plaintiff attempts to distinguish *Gillespie* from the case on appeal by emphasizing that *Gillespie* dealt with an oral agreement, concerning a change in the mode of payment, which was contemporaneous with the contract. Such an agreement was deemed an exception to the parol evidence rule. Plaintiff argues that, in contrast, the case *sub judice* deals with a later modification of the terms of the note which was not shown to have been by mutual consent or made upon additional consideration. We disagree. There was no modification of the terms of the note. Instead defendant's evidence, like that of the defendant in *Gillespie*, merely shows that the parties entered into an oral agreement to change the mode of payment. The averments in Frank Wilson's affidavit, filed on defendant's behalf, supports this conclusion. Wilson's affidavit also raises the affirmative defense of payment and meets the requirements of Rule 56(e) of the North Carolina Rules of Civil Procedure. Pursuant to Rule 56(e), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Wilson swore that he, acting as defendant's agent, was advised by Bill Robinson, plaintiff's Branch Manager, that \$20,000 due from plaintiff to the dealership would be applied to the initial payments owing on the note. The evidence in the record on appeal indicates that this sum would cover at least the first three payments under the note. These facts asserted by defendant's agent must be accepted as true by the trial court when considering plaintiff's motion for summary judgment. *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972). The law as to summary judgment also requires the court to construe all the evidence in the light most favorable to the non-moving party. Any doubt as to whether a genuine issue of material fact exists must be resolved in the favor of the non-moving party. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, cert. denied, 279 N.C. 619, 184 S.E. 2d 883 (1971). Application of this law to the case on appeal compels us to reverse the judgment of the trial court

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**State v. Andrews**

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awarding summary judgment in plaintiff's favor. We note that since the averments in Wilson's affidavit are deemed true in considering plaintiff's motion for summary judgment, it would appear that plaintiff then had the duty to transfer the \$20,000 credit to the debt owing on the promissory note. Evidence of such a transfer would be solely within the personal knowledge of plaintiff.

Since there exists a genuine issue of material fact as to whether or not payments were made pursuant to the promissory note, summary judgment was not appropriate.

In light of our decision, we need not consider whether defendant's amended answer, which arguably could have been considered as an affidavit, raised a genuine issue of material fact.

Reversed.

Judges HEDRICK and MARTIN (Robert M.) concur.

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STATE OF NORTH CAROLINA v. WILLARD PHILLIP ANDREWS

No. 8110SC845

(Filed 16 February 1982)

**1. Larceny § 7.4— possession of stolen property—sufficiency of evidence**

In a prosecution for felonious possession of stolen goods, a witness's in-court identification of a diamond which had been stolen, cut from the ring, and remounted by the date of trial, was not so "inherently incredible" that the case should not have gone to the jury.

**2. Criminal Law § 42.6— stolen diamond—identification—chain of custody not necessary**

In a prosecution for felonious possession of stolen goods, a witness's identification of a diamond, which was alleged to have been stolen, was proper without establishing a chain of custody.

APPEAL by defendant from *Preston, Judge*. Judgment entered 13 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 14 January 1982.

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State v. Andrews

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Defendant was indicted for second degree burglary, felonious larceny, and felonious possession of stolen goods. The jury found defendant not guilty of second degree burglary and felonious larceny, but not guilty of felonious possession of stolen goods. Defendant appeals from a judgment of imprisonment.

*Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.*

*Upchurch, Galifianakis & McPherson, by William V. McPherson, Jr., for defendant-appellant.*

HILL, Judge.

The State's evidence tended to show that at 7:00 p.m. on the night of 13 October 1979, the family of Robert Beverly Herbert, Jr. left their house on Reid Street in Raleigh to attend a concert. He came home about 11:00 p.m., and Herbert's wife discovered that her jewelry box was empty. After discovering other evidence of theft, Herbert called the police. Herbert and the police discovered a heavily damaged side door and lock mechanism. "Both the lock mechanism and the door appeared as if someone had been prying at it with a crowbar or something." A few feet away, they discovered that the screen had been removed from the downstairs bathroom window, and the window had been pushed open from the bottom. Nothing was taken from the house but jewelry and silver items.

The only jewelry item recovered was Herbert's wife's diamond ring. Herbert testified that on 13 October, the emerald cut diamond, approximately eight-tenths of a carat, was set in white gold mounting with a yellow gold ring. Herbert further testified that

[w]hen we got back what was returned to us, the diamond had been cut out. The ring was gone. The diamond was still in its original white gold prongs, but there was only a minute fraction, just say a sixteenth of an inch of the yellow gold visible on either side of that, and the rest of the ring had been cut away. So it was made into another ring just exactly like the first. It still has the original prongs.

Various silver items belonging to Herbert also were recovered.



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State v. Andrews

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The State offered additional evidence from Sandra Adams Andrews, defendant's cousin and sister-in-law, who testified under an agreement with the State. Andrews testified that she, her husband, and defendant had been involved in several break-ins. On the night of 14 October 1979, Andrews was at home when she saw defendant about 9:00 p.m. Defendant showed her a diamond and asked if she would buy it. "The stone was like an emerald cut, a stone, it was not a ring. It was a stone that was in the prongs." Andrews bought the diamond for \$200. When she was shown at trial the diamond Herbert had mounted onto another ring, Andrews identified it as "the stone that I purchased from Willard Andrews, the top part. It was cut off, I'll say about here (indicating) and it was just this and the prongs."

Defendant offered evidence tending to show that he was in New Jersey on 13 October 1979. John Branca, defendant's former brother-in-law, testified that defendant brought a 1973 Gremlin automobile to his business, where Branca put on two tires, "adjusted his car and changed the oil in it." Defendant stayed in New Jersey for dinner on 14 October at approximately 2:00 p.m., and left around 4:30 p.m. Carmen Branca, also defendant's former brother-in-law, corroborated John Branca's testimony.

[1] In defendant's first two arguments, he challenges the sufficiency of Andrews' identification of the diamond allegedly stolen from Herbert's home and the sufficiency of that testimony to support his conviction of possession of stolen property.

Defendant correctly states that the identification of the diamond by Andrews is the only evidence which connects him with stolen property. Possession of such property, of course, is a necessary element of the offense of possessing stolen goods. See G.S. 14-71.1.

While ordinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury, this rule does not apply when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the physical conditions established by the State's own evidence.

*State v. Wilson*, 293 N.C. 47, 51, 235 S.E. 2d 219, 221 (1977). This rule is based upon *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902

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(1967), which, defendant argues, supports his contention that Andrews' identification of the diamond is incredible. In *Wilson*, our Supreme Court interpreted *Miller* to have "no application where . . . 'there is a *reasonable possibility of observation* sufficient to permit subsequent identification.'" *State v. Wilson, supra*, at 52, 235 S.E. 2d at 222, *quoting State v. Miller, supra*, at 732, 154 S.E. 2d at 906 (emphasis added).

The State's evidence in the case *sub judice* indicates that Andrews described the diamond she saw on 14 October 1979 and noted that its mounting no longer had a ring attached. This scrutiny at the time of purchase clearly was sufficient to support Andrews' identification of the diamond presented at trial. The presence or absence of the ring attached to the diamond does not render the diamond materially changed and thereby unidentifiable. Thus, we do not find the identification so "inherently incredible" that the case should not have gone to the jury. In addition, the fact that Andrews' testimony on this matter is "[u]ncorroborated accomplice testimony," as defendant states, does not affect the sufficiency of that evidence to go to the jury. See *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961). These arguments are without merit.

[2] Defendant's final argument alleges that there was no foundation laid for the receipt of the diamond and silver into evidence in that (1) the State failed to establish a chain of custody; (2) there was a substantial change in the condition of the diamond from the time of defendant's alleged possession of it and the trial; and (3) there was no competent evidence to link the stolen goods to defendant. Because of our determination of defendant's other arguments, we choose only to address (1) above.

The following rules are applicable to our decision:

Objects offered as having played an actual, direct role in the incident giving rise to the trial are denoted "real evidence." [Citations omitted] Such evidence must be identified as the same object involved in the incident in order to be admissible. [Citation omitted] It must also be shown that since the incident in which it was involved the object has undergone no material change in its condition. [Citations omitted] . . . [W]hen a tangible object is offered it must be first authenticated or identified, "and this can be done only

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by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is." [Citation omitted]

There are no simple standards for determining whether an object sought to be offered in evidence has been sufficiently identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. . . . Consequently, the trial judge possesses and must exercise a *sound discretion* in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition.

*State v. Harbison*, 293 N.C. 474, 483-84, 238 S.E. 2d 449, 454 (1977) (emphasis added). "[W]hen the question is whether the article is one that the witness observed on a prior occasion, evidence that it 'looks like,' or even that it is 'similar to,' the object observed may be sufficient." 1 Stansbury's N.C. Evidence (Brandis rev. 1973) (1979 Cum. Supp.) § 117, p. 192, n. 2. Under these circumstances, a chain of custody need not be proven. *State v. White*, 48 N.C. App. 589, 269 S.E. 2d 323 (1980).

In the case *sub judice*, Andrews identified the diamond at trial as the same object she purchased on 14 October 1979. We have concluded that the diamond has not undergone any material change that would render it unidentifiable. In addition, the diamond was offered properly for identification. Therefore, we find that the trial judge did not abuse his discretion in allowing the identification of the diamond under these circumstances; Andrews' testimony was sufficiently certain to show that the diamond was the same.

Although we find none of the requisite predicates to the admission into evidence of the silver, the trial judge's error in admitting such evidence is harmless in light of our foregoing determinations.

In defendant's trial, we find

No error.

Judges HEDRICK and BECTON concur.

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HARLEY GARY HOLLAND v. ELIZABETH ANN HOLLAND

No. 8130DC400

(Filed 16 February 1982)

**1. Divorce and Alimony § 23.3; Infants § 5— child residing in another state— jurisdiction of child custody action**

There was not available in this State substantial evidence relevant to a child's present or future care, protection, training, and personal relationships so as to give the Jackson County District Court jurisdiction under G.S. 50A-3(a)(2) to determine custody of the child where the child has resided with its father in Georgia since it was five years old; at the time of the hearing, the child was eleven years old; the child had only briefly visited Jackson County; the mother had only sparse contacts with the child during the previous six years; persons named by defendant mother as being able to give evidence could not give substantial evidence as to the child's present life interests or needs; and it appears that the requisite evidence could only be given by persons or sources in the community in which the child has lived and begun to grow up.

**2. Divorce and Alimony § 23.3; Infants § 5— child residing in another state— jurisdiction of child custody action—substantial evidence**

The quality of evidence required for the court to enter a child custody order under G.S. 50A-3(a)(2) goes beyond the standard of "more than a scintilla" or "any competent evidence"; rather, the "substantial evidence" required by the statute must be such as would enable the trial court to look to sources within the State that could address each of the statutory aspects of the child's interests, care, protection, training and personal relationships.

APPEAL by plaintiff from *McDarris, Judge*. Order entered 28 November 1980 in District Court, JACKSON County. Heard in the Court of Appeals 20 November 1981.

Defendant filed a motion in the cause, seeking custody of a minor son born of her marriage to plaintiff. Plaintiff appeared specially and moved to dismiss, asserting a lack of jurisdiction in the trial court. Following a hearing at which the trial court heard only the testimony of defendant, the Court entered an order concluding that the trial court should assume jurisdiction and hear the case on its merits. Plaintiff has appealed.

*Holt, Haire & Bridgers, P.A., by Ben Oshel Bridgers, for plaintiff-appellant.*

*Raymond D. Large, for defendant-appellee.*

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**Holland v. Holland**

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WELLS, Judge.

[1] This matter involves an interpretation of North Carolina's Uniform Child Custody Jurisdiction Act, G.S. 50A-1, *et seq.* We find that the crucial jurisdictional requirements in the Act are not present in this case and reverse. The pertinent portions of the Act are:

G.S. 50A-1. (a) The general purposes of this Chapter are to:

- (1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
- (2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
- (3) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and the child's family have the closest connection and where significant evidence concerning the child's care, protection, training, and personal relationships is most readily available, and that courts of this State decline the exercise of jurisdiction when the child and the child's family have a closer connection with another state;

G.S. 50A-3. (a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

- (1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

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- (2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or
- (3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
- (4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

The evidence before the trial court consists of plaintiff's verified complaint in the original cause, defendant's and plaintiff's motions in the cause relating to this case, and the testimony of the defendant-mother of Gary Dale Holland. This evidence tends to show the following circumstances and events relevant to the custody of Gary Dale. Two children were born of the marriage of plaintiff and defendant: Gary Dale, born 5 May 1969 and Annette Elaine, born 2 November 1971. Plaintiff and defendant were separated on 25 November 1971 and judgment of divorce was entered 5 January 1972. Custody of the children was not provided for in the divorce decree, the parties having agreed that defendant would have custody of the children. During the latter part of the summer of 1974, plaintiff moved to Griffin, Georgia and took Gary Dale with him. In October, 1974, defendant moved to New Bern, North Carolina where she lived until September, 1976 when she returned to live in Jackson County. Plaintiff has continued to live in Georgia with Gary Dale since the late summer of 1974. Defendant did not visit Gary Dale nor did he visit her from late summer of 1974 until the fall of 1976, when defendant went to Georgia to visit Gary Dale. There was evidence that Gary Dale has made one

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visit, with his father, to Jackson County since 1974. Plaintiff's mother, father, brother, and sister live in Jackson County.

Defendant testified that "the biggest majority" of her relatives live in Jackson County. She testified that there were eleven named persons in Jackson County who knew her, knew her when Gary Dale lived with her, were familiar with her home, and could testify as to her fitness as a parent. None of these named persons testified. Defendant also testified that the Jackson County Department of Social Services had investigated her home quite a few times within the past three years. Defendant remarried in 1974 and was divorced in 1978. Defendant has lived in Jackson County since the fall of 1976.

The trial court concluded that Georgia is the "home state of Gary Dale; that defendant has significant connections with North Carolina; and that plaintiff has significant connections with North Carolina. These conclusions are supported by the evidence and are not at issue.

The trial court also concluded that there is available in North Carolina substantial evidence relevant to Gary Dale's past, present and future care, protection, training, and personal relationships. The findings of fact upon which that conclusion is based are not supported by the evidence.

At the time he moved with his father to Georgia, Gary Dale was five years old. At the time of the hearing, Gary Dale was eleven years old. During that six year interval, Gary Dale had only briefly visited Jackson County. It thus appears that evidence of his life style, home environment, neighborhood environment, progress in school, and the conditions of his health, both with respect to the present and future, could only come from persons or sources in the community where he has lived and begun to grow up. Gary Dale's contacts with his mother during the previous six years were so sparse as to make it obvious that she could not give substantial evidence as to his present care, training, and personal relations. Even more obvious is the fact that those persons defendant named as being available to give evidence could not give substantial evidence as to Gary Dale's present life interests, or needs. Defendant's lack of detail as to her own relationship with the persons she named as available witnesses make it questionable as to whether they could give substantial evidence as to Gary Dale's future care, training, protection, and personal relations. The record is void of any substan-

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tial evidence from defendant, reflecting only defendant's bare assertion that she could provide some testimony as to her own situation. Although the trial court found that the Jackson County Department of Social Services had conducted investigations and prepared reports as to the home life of defendant, this finding is based only upon defendant's statement to the court that the Agency had investigated her home and had made no negative findings. This finding is immaterial to the issue of Gary Dale's welfare.

[2] Jurisdiction in this case could not be grounded except under G.S. 50A-3(a)(2). The test there is twofold, requiring both a significant parental connection with this state *and* substantial evidence available in the state as to *present or future care, protection, training, and personal relationships*.<sup>1</sup> We hold that the quality of evidence required under this section of the statute goes beyond the standard of "more than a scintilla" or "any competent evidence". See *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). To be able to enter a well-founded custody order, the trial court must look beyond the declarations of competing parents, seeking to find the real circumstances of the child's welfare. The "substantial" evidence required by the statute, therefore, must be such as would enable the trial court to look to sources within the state that could address each of the statutory aspects of the child's interest, care, protection, training, and personal relationships. See *Davis v. Davis*, 53 N.C. App. 531, 281 S.E. 2d 411 (1981); *Green v. Green*, 87 Mich. App. 706, 276 N.W. 2d 472 (1978); *Theresa H. v. Pasquale G.*, 102 Misc. 2d 759, 424 N.Y.S. 2d 652 (1980); compare *Etter v. Etter*, 43 Md. App. 395, 405 A. 2d 760 (1979); see also Ratner, "Child Custody in a Federal System", 62 Mich. L. Rev. 795 (1964).

This case provides a clear example of what the Act was intended to prevent: forum shopping for the convenience of competing parents to the detriment of the real interest of the child.

Defendant did not establish any of the jurisdictional requirements of the Act.

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1. Although plaintiff did not follow the precise requirements of App. R. in seeking to preserve for our review the findings of fact and conclusions of law argued in his brief, his exceptions to the judgment preserves for our review, pursuant to Rule 10(a), the question of whether the trial court had subject matter jurisdiction.



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The order of the trial court is

Vacated.

Judges ARNOLD and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. JAMES FRANKLIN McLELLAN

No. 8116SC853

(Filed 16 February 1982)

**1. Criminal Law § 89; Witnesses § 1.3— interpreter of testimony—relative of victim**

The trial court did not abuse its discretion in appointing a relative of a robbery victim to interpret the victim's testimony. The victim had suffered an injury when he was young which made it difficult for him to pronounce clearly certain words. His half sister, who was familiar with the victim's speech impediment, was properly appointed to interpret as there was no evidence presented as to specific prejudices she may have had, and she was used only when an attorney, defendant or juror indicated an inability to understand.

**2. Criminal Law § 113.1— incorrect summary of evidence—no prejudice**

An error in the court's charge, where it incorrectly stated that defendant, rather than another man, had received a wallet and checkbook from the victim, was not prejudicial as in the same sentence the court correctly summarized that another man went through the victim's pockets, taking his wallet and checkbook, and as the charge as a whole was correct.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 3 March 1981 in Superior Court. ROBESON County. Heard in the Court of Appeals 1 February 1982.

Defendant was convicted of armed robbery. Judgment imposing a prison sentence was entered.

*Attorney General Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for the State.*

*Appellate Defender Project for North Carolina, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.*

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VAUGHN, Judge.

Defendant brings forward two assignments of error, neither of which discloses prejudicial error.

[1] Defendant first argues the trial court abused its discretion in appointing a relative of the robbery victim to interpret his testimony. We disagree.

A court has the inherent authority to appoint an interpreter for the proper transaction of its business. *Wise v. Short*, 181 N.C. 320, 322, 107 S.E. 134, 136 (1921). Because of the possibility of inadvertent distortion of testimony, however, an interpreter should not be appointed unless necessary. Such necessity arises when the witness's normal method of communication is unintelligible to those in the courtroom.

In *Wise v. Short*, *supra*, the Supreme Court upheld a court's appointment of an interpreter to translate a holographic will written in the Syrian language. G.S. Chap. 8B details the procedure for the appointment of an interpreter for deaf persons. The decision of whether an interpreter is warranted in a particular case is a decision within the trial judge's discretion. It will not be reviewed absent a showing of abuse of discretion. *Kley v. Abell*, 483 S.W. 2d 625 (Mo. App. 1972); *State in Interest of R.R.*, 79 N.J. 97, 398 A. 2d 76 (1979).

Before trial in the present cause, the State presented evidence that Billy Ray Joyner, the 49-year-old victim of the alleged robbery, had a speech disability caused by a childhood accident. Carolyn Martin, Mr. Joyner's half sister, testified that his lower jawbone had been injured and there were certain words he could not pronounce. At the close of the *voir dire*, the court concluded that at times during the victim's testimony, an interpreter may be necessary. In light of the court's instruction that Mr. Joyner's testimony should be interpreted only when an attorney, defendant or juror indicated an inability to understand, we conclude the court was well within its discretion in appointing an interpreter. See generally *State in Interest of R.R.*, *supra*.

The next question is whether the court abused its discretion in its selection of the interpreter. Any qualified person may be appointed and act as an interpreter. *Wise v. Short*, 181 N.C. 320, 322, 107 S.E. 134, 136 (1921). Defendant argues that the court

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erred in finding Carolyn Martin qualified because she is a relative of Billy Ray Joyner. Defendant contends that the judge should have appointed either an impartial interpreter or no interpreter at all.

When an interpreter is appointed, it is vital that he act impersonally—repeating the witness's testimony without embellishment or deletion. For that reason, we recognize that whenever possible, a disinterested interpreter should be appointed. Annot., 6 A.L.R. 4th 158 (1981). There are situations, however, when the "disability" of a witness is such that a disinterested interpreter would be of little assistance to the court. In cases like the present one, where the witness cannot speak clearly because of a speech impediment, some familiarity with the witness may be necessary. Emphasizing the witness's distinctive speech patterns, reviewing courts in these cases have upheld the trial court's discretion in appointing as interpreter a friend or relative of the witness. *E.G.*, *Fairbanks v. Cowan*, 551 F. 2d 97 (6th Cir. 1977) (father appointed interpreter of sodomy victim who could only make guttural sounds); *United States v. Addonizio*, 451 F. 2d 49 (3rd Cir. 1971), *cert. denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed. 2d 812 (1972), *reh. denied*, 405 U.S. 1048, 92 S.Ct. 1309, 31 L.Ed. 2d 591 (1972) (wife appointed interpreter of witness who was unable to speak above a loud mumble); *Almon v. State*, 21 Ala. App. 466, 109 So. 371 (1926) (mother appointed interpreter of tongue-tied rape victim); *Renick v. Hays*, 201 Ky. 192, 256 S.W. 26 (1923) (daughter appointed interpreter of plaintiff with speech impediment).

In the present case, the prosecuting witness had suffered an injury when he was six years old which made it difficult for him to pronounce clearly certain words. His half sister testified that she had known and communicated with him since childhood and was able to understand him better than most people. Defendant's attorney had an opportunity to cross-examine Carolyn Martin outside the presence of the jury. *Compare with Kley v. Abell*, 483 S.W. 2d 625 (Mo. App. 1972). There was no evidence presented as to any specific prejudice she may have had. Since the State did not plan to call her as a primary witness, the potential for her improperly using the interpretation to corroborate her own testimony was not present. *Compare with State in Interest of R.R.*, 79 N.J. 97, 398 A. 2d 76 (1979). Defendant's attorney presented no argument opposing the State's tender of her as an

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interpreter. In light of the foregoing, we conclude that the court's appointment of the victim's half sister as interpreter did not amount to an abuse of discretion.

We further note the lack of any events during the trial which would have warranted the removal of Carolyn Martin as interpreter. Questions were addressed directly to Joyner, the victim of the robbery. *See* Annot., 6 A.L.R. 4th 158 (1981). Mrs. Martin did not repeat his testimony unless the judge, an attorney, or a juror indicated that he did not understand what was said. Defendant's attorney did not object to her interpretation. No prejudice has been shown. *See generally Fairbanks v. Cowan, supra; Almon v. State, supra.* Defendant's assignment of error is overruled.

**[2]** Defendant's second assignment of error is that the court committed prejudicial error in its jury charge. We disagree.

Defendant and four other men were charged with the armed robbery of Billy Ray Joyner. Their cases were joined for trial. The State presented evidence that on 10 November 1980, the five codefendants picked up Joyner who was hitchhiking along Highway 41. Joyner sat in the backseat of the car between McLellan and defendant Brown. Defendants Riggins, Jones, and Williams were in the front seat. Joyner testified that after riding for about two blocks, McLellan pulled out a gun and placed it under his neck. Brown then reached into his pockets and took his checkbook and wallet. One of the individuals in the front seat reached back and took his watch. Thereafter, Joyner was thrown out of the car.

In summarizing the State's evidence, the court incorrectly stated that it was McLellan, rather than Brown, who had received the wallet and checkbook from the victim. Defendant argues that the misstatement was prejudicial because it improperly added credibility to the testimony of defendants Riggins, Jones, and Williams. These defendants had testified that they did not participate in the robbery; it was McLellan who had demanded the money. The only reason they later accepted some of Joyner's money from McLellan was because they were frightened by McLellan and his gun.

Defendant highlights an isolated portion of the court's jury instructions. The charge, however, must be construed contextual-

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ly. *State v. Gaines*, 283 N.C. 33, 43, 194 S.E. 2d 839, 846 (1973). In the same sentence containing the misstatement of Joyner's testimony, the court correctly summarized that Andrew Brown went through Billy Joyner's pockets, taking his wallet and checkbook. We will not hold one portion prejudicial when the charge as a whole is correct. *Id.* Furthermore, defendant at trial failed to object to any of the submitted instructions. It is a general rule that objections to the judge's summary of the evidence must be made before the jury retires so that the court has an opportunity for correction. Failure to object is deemed a waiver. *State v. Hammonds*, 301 N.C. 713, 272 S.E. 2d 856 (1981). We overrule defendant's assignment of error.

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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JACQUELINE B. SIMMONS v. QUICK STOP FOOD MART, INC.

No. 8112DC438

(Filed 16 February 1982)

**Partnership § 2— conveyance of property to partnership—partner's conveyance of interest in the property—legal title still in partnership**

Where real property was conveyed to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership" by a deed which referred in the granting clause and habendum to the grantee as the "party of the second part, its successors, heirs and assigns"; a lease was executed by "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership" to defendant; the partnership was thereafter dissolved and "Johnny L. Wood and wife" conveyed "all of their one-half undivided interest" in the property to "Oscar Harold Simmons and wife"; and pursuant to a separation agreement, Oscar Harold Simmons conveyed the property to his wife, the plaintiff in this action, it was held that (1) the conveyance to "Johnny L. Wood and Oscar Simmons d/b/a Wood and Simmons, Investments, a partnership" vested title in the partnership rather than in the partners as individuals, (2) legal title to the property remains in the partnership since the property was not conveyed in the partnership name, (3) the lease to defendant continues as a partnership affair even though the partnership has been dissolved, and (4) plaintiff wife has no standing to pursue summary ejectment proceedings as legal owner of the property and defendant's landlord.

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APPEAL by plaintiff from *Cherry, Judge*. Order entered 23 February 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 10 December 1981.

This is a summary ejectment proceeding brought on 2 December 1980 by the alleged owner of certain property against her alleged tenant. Three days later, the action was removed from the magistrate to the district court upon defendant's denial of plaintiff's title to the property. Plaintiff and defendant each moved for summary judgment; defendant's motion was granted. Plaintiff appeals from this order.

*J. Gates Harris and Thomas H. Finch, Jr. for plaintiff-appellant.*

*Ervin I. Baer for defendant-appellee.*

HILL, Judge.

On 21 May 1970 Johnny L. Wood [hereinafter referred to as Wood] and Oscar Harold Simmons [hereinafter referred to as Simmons] executed a partnership agreement creating Wood and Simmons Investments [hereinafter referred to as the partnership]. This agreement was never recorded, nor was the partnership name registered. On the same day, Wood conveyed to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership" two tracts of land along North Carolina Highway 87 in Cumberland County, on which was situated a store building. On 28 May, a lease was executed by "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership," to defendant. The lease, signed by Wood and Simmons individually, was for a term of ten years with two five-year options to renew.

On 30 June 1976, Wood and Simmons dissolved the partnership and "Johnny L. Wood and wife, Zula Wood," conveyed "all of their one-half undivided interest" in the property to "Oscar Harold Simmons and wife, Jacqueline B. Simmons." The deed was recorded 16 July 1976.

Simmons and his wife, plaintiff herein, executed a separation agreement on 5 November 1979 which provided that he convey to her the property in exchange for other tracts of land. The deed of conveyance between "Oscar Harold Simmons," grantor, and "Jac-

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**Simmons v. Quick Stop Food Mart**

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queline B. Simmons," grantee, was recorded 5 November 1979. The following day, 6 November 1979, plaintiff notified defendant that it must vacate the store building. Defendant refused to vacate the building. Defendant recorded its lease 26 November 1980.

Defendant is entitled to summary judgment "if there was no genuine issue of material fact concerning an essential [sic] element of the plaintiff's claim." *Ramsey v. Rudd*, 49 N.C. App. 670, 672, 272 S.E. 2d 162, 163 (1980), *disc. rev. denied*, 302 N.C. 220, 276 S.E. 2d 917 (1981). *Accord, Best v. Perry*, 41 N.C. App. 107, 254 S. E. 2d 281 (1979). Plaintiff's title to the property is an essential element in an ejectment proceeding. *Hayes v. Ricard*, 245 N.C. 687, 97 S.E. 2d 105 (1957).

Plaintiff's sole contention on appeal is that the deeds of 16 July 1976 and 5 November 1979 convey legal title to her and thereby "confers a superior right to the prior lease." Defendant argues that title remains with the partnership, which still is its landlord, since the partnership never conveyed "out" its interest in the property. Thus, the question is whether the 21 May 1970 conveyance "in" to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership" vested title in the partnership or in the partners as individuals.

"All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property." G.S. 59-38(a). Partners' interests in partnership property has been described as a "tenancy in partnership." *Ewing v. Caldwell*, 243 N.C. 18, 23, 89 S.E. 2d 774, 777 (1955). When title to the property is *in the partnership name*, it may be conveyed "out" by any partner *in the partnership name*. G.S. 59-40(a). In such cases, however, when the partner conveys partnership property "out" *in his own name*, he merely "passes the equitable interest of the partnership. . ." G.S. 59-40(b).

In deciding whether the 21 May 1970 deed is *in the partnership name*, we must look to the 'four corners' of the document. *Rouse v. Strickland*, 260 N.C. 491, 133 S.E. 2d 151 (1963); *Hardy v. Edwards*, 22 N.C. App. 276, 206 S.E. 2d 316, *cert. denied*, 285 N.C. 659, 207 S.E. 2d 753 (1974). Thus, the grantor's intended grantee

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may be ascertained by reviewing the granting clause, which provided,

[t]hat said parties of the first part, in consideration of other good and valuable consideration and the sum of Ten--Dollars to them paid by *party* of the second part the receipt of which is hereby acknowledged have bargained and sold, and by these presents do grant, bargain, sell and convey to said party of the second part, its successors, heirs and assigns, a certain tract or parcel of land. . .

(Emphasis added.) Further, the habendum clause provided, "TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said *party* of the second part, *its* successors, heirs and assigns, to *its* only use and behoof forever." (Emphasis added.)

The emphasized language of the deed quoted above indicates that the grantor intended the partnership entity to be the grantee rather than the partners as individuals. Under G.S. 59-40(a), then, the conveyance "out" must be *in the partnership name*. However, the deed recorded on 16 July 1976 was executed by "Johnny L. Wood and wife, Zula Wood," *individually*, rather than in the partnership name. At most, this deed conveyed "out" the "equitable interest of the partnership." G.S. 59-40(b). The deed of 5 November 1979 has the same effect under G.S. 59-40(b) since the named grantor is "Oscar Harold Simmons." Legal title therefore remains in the partnership despite the deeds through which plaintiff claims title.

Plaintiff argues, however, that if title is in the partnership name, she has acquired legal title by the deeds of 16 July 1976 and 5 November 1979 since the partnership was dissolved on 30 June 1976. We do not agree.

"On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." G.S. 59-60. Since legal title to the property remains in the partnership, the lease under which defendant is named tenant continues as a partnership affair. The partnership affairs thereby are incomplete, and the partnership, though dissolved, has not yet "terminated."



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For these reasons, we conclude that plaintiff has no legal title to the property and no standing to pursue summary ejectment proceedings as owner of the property and defendant's landlord. Defendant's motion for summary judgment therefore was properly granted.

Affirmed.

Judges VAUGHN and WEBB concur.

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STATE OF NORTH CAROLINA v. GERALDINE STANLEY

No. 8117SC852

(Filed 16 February 1982)

**1. Homicide § 21.1— second degree murder—sufficiency of evidence**

In a second degree murder case, the trial court did not err in denying defendant's motions for nonsuit and for appropriate relief where the evidence tended to show that defendant and the deceased had been drinking and argued together; that defendant stated several times that deceased killed himself; that defendant also stated that the gun was in her hand when it went off; that expert testimony indicated that the gunshot wound was not compatible with one that was self-inflicted; and that the gun was found in the victim's right hand, but the gunshot wound was on the left side of his head.

**2. Homicide § 21.9— involuntary manslaughter—sufficiency of evidence**

The trial court did not err in denying defendant's motion for appropriate relief from a verdict of involuntary manslaughter where the defendant's own testimony disclosed that she and the deceased struggled with a gun, it went off and, after scuffling, the gun was in her hand.

APPEAL by defendant from *Washington, Judge*. Judgment entered 26 March 1981 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 15 January 1982.

Defendant was indicted for first-degree murder, but at trial the State elected to proceed on a charge of second-degree murder. Defendant was found guilty of involuntary manslaughter, and appeals from the imposition of a sentence of imprisonment for not less than two years nor more than four years.

STATE'S EVIDENCE

At trial, the State's evidence tended to show the following: The deceased, Terry Scott "Pete" Wilkerson, was defendant's

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boyfriend. He had a jealous nature and a reputation for fighting. On 29 June 1980 defendant, her mother Elsie Stone, and the deceased had been to a local tavern, the Red Dog. They had been drinking, and defendant and the deceased argued about her talking to other men. When they returned to defendant's home, she and the deceased remained in her car. Defendant told law enforcement officers and Wilkerson's mother that Wilkerson told her if he could not have her, he did not want to live and then shot himself in the head with a pistol defendant kept in her car. The wound was on the left side of Wilkerson's body; the gun was found in his right hand. Although Wilkerson was alive when the ambulance arrived, he later died at the hospital.

Dr. Jerome Tifp, a pathologist with the State Medical Examiner's office, and Douglas Branch, a firearms expert with the State Bureau of Investigation, testified that, in their opinions, the gunshot wound to the deceased was not self-inflicted since there was no gun residue around the wound.

Robert Gray, Captain of the Sheriff's Department, testified that he had interviewed defendant on the night the shooting occurred, 29 June 1980, and again on 9 July 1980. On both occasions defendant stated that Wilkerson had shot himself. After receiving the autopsy report, Captain Gray and another officer talked to defendant on 21 July 1980. After being advised of her constitutional rights, defendant made a statement to the officers which she signed and dated. She told them that the deceased had given her the gun as they sat in the car, telling her to shoot him. They struggled with the gun and when the gun was in her hands, it went off, wounding the deceased. She thought her mother had placed the gun in Wilkerson's hand before law enforcement officers arrived.

#### DEFENDANT'S EVIDENCE

Defendant testified that on the way to her house from the tavern, Wilkerson was accusing her of somebody following her home. He was angry and said defendant did not care for him or love him. Defendant went inside the house for a few minutes, leaving Wilkerson in the car. When she returned to the car, he told her he was going to shoot himself and held the gun to his head. She tried to calm him, to keep him from shooting himself.

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They struggled over the gun, and it fired, striking Wilkerson. She never put her hand on the trigger.

Twelve character witnesses testified in defendant's behalf.

*Attorney General Edmisten by Assistant Attorney General Daniel C. Oakley for the State.*

*Robert S. Cahoon for defendant appellant.*

CLARK, Judge.

[1] Defendant assigns as error the failure of the trial court to grant her motions for nonsuit and for appropriate relief. She contends that the State's evidence, excluding her own statements, was insufficient to withstand the motion for judgment as of nonsuit. She argues that the statements were exculpatory and were not disproved by any of the State's evidence.

Upon motion for judgment as of nonsuit, all admitted evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable inference drawn therefrom. Contradictions and discrepancies in the evidence are matters for the jury and do not warrant nonsuit. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288, 98 S.Ct. 414 (1977). There must be substantial evidence of all material elements of the offense in order to overcome the motion to dismiss. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

In order to establish the crime of second-degree murder, the State must prove beyond a reasonable doubt that there was an unlawful killing of a human being with malice but without premeditation and deliberation. G.S. 14-17. If the killing was done with a deadly weapon, it will be presumed that the killing was unlawful and done with malice. *State v. Hodges*, 296 N.C. 66, 249 S.E. 2d 371 (1978).

The State's evidence in this case tended to show that defendant and the deceased, Terry Scott Wilkerson, had been drinking on 29 June 1980 and were arguing with each other. Although defendant stated on several occasions that Wilkerson killed himself, she also stated that the gun was in her hand when it went off. Expert testimony indicated that the gunshot wound was

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not compatible with one that was self-inflicted. The fact that the gun was found in Wilkerson's right hand, but the gunshot wound was on the left side of his head also raises questions concerning the alleged suicide.

While defendant's statements to law enforcement officers do contain some exculpatory evidence, we believe that the physical factors involved, the expert testimony and the inculpatory portions of defendant's statements were sufficient to permit the jury to draw the reasonable inference that defendant unlawfully and with malice killed Terry Scott Wilkerson. While some of defendant's statements may tend to exculpate her of second-degree murder, this does not prevent the State from showing that the facts concerning the homicide were different from what the defendant stated. If the State introduces evidence that defendant is guilty of each element of the offense, the exculpatory statements do not warrant nonsuit. *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Wilson*, 264 N.C. 373, 141 S.E. 2d 801 (1965). Although the jury did not convict defendant of this specific offense, we hold that the State's evidence was sufficient to overcome the motion for judgment as of nonsuit and to submit the issue to the jury.

[2] We also find no merit in defendant's contention that the trial court erred in denying her motion for appropriate relief from the verdict of involuntary manslaughter. The defendant's own testimony disclosed that she and the deceased struggled with the gun, it went off and after the scuffling, the gun was in her hand. It is well-established that one who points a loaded gun at another, although without the intention of discharging it, commits manslaughter if the gun goes off accidentally and kills the other. *State v. Stimpson*, 279 N.C. 716, 185 S.E. 2d 168 (1971). We conclude that there was sufficient evidence showing a wanton or reckless use of a firearm so as to support the verdict of the jury.

In the trial of defendant, we find

No error.

Judges ARNOLD and WHICHARD concur.

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STATE OF NORTH CAROLINA v. DENNIS GENE TAYLOR

No. 8127SC872

(Filed 16 February 1982)

**1. Criminal Law § 42.2— articles connected with the crime— authentication**

In an armed robbery prosecution in which evidence was presented that defendant robbed a store with a .45 caliber pistol while wearing a green army jacket and that he obtained cash from the store's cash register, a .45 caliber pistol, a green army jacket and \$89 in currency found by an officer in defendant's car an hour after the robbery were properly admitted into evidence, even without direct evidence that those articles were the ones possessed or taken by the perpetrator, where the officer identified each article as one he removed from defendant's car and testified that each article had been in his possession or custody since that time.

**2. Criminal Law § 101.4— taking exhibits into jury room— objection by defendant— harmless error**

The trial court violated G.S. 15A-1233(b) in permitting the jury, over defendant's objection, to take into the jury room photographs which had been admitted into evidence, but such error was not prejudicial to defendant.

APPEAL by defendant from *Burroughs, Judge*. Judgment entered on 26 March 1981 in Superior Court, GASTON County. Heard in the Court of Appeals on 2 February 1982.

Defendant was charged in a proper bill of indictment with armed robbery. Upon a plea of not guilty, defendant was found guilty as charged. From a judgment imposing a prison sentence of not more than 25 nor less than 12 years, defendant appealed.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.*

*Assistant Public Defender Kellum Morris, for defendant appellant.*

HEDRICK, Judge.

[1] In his first assignment of error, defendant argues that "the court committed error in permitting the State to enter certain articles into evidence without first requiring the State to lay the proper foundation for their admission." Defendant's contention is that the requisite foundation must include testimony that the articles admitted, here a .45 caliber automatic pistol, a green army

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jacket, and \$89 in currency, were identical with or similar to the articles used or taken by the actual culprit when he committed the crime.

"Real evidence is that evidence which is provided by producing for inspection at trial a particular item rather than having witnesses describe it." *State v. Barfield*, 298 N.C. 306, 336, 259 S.E. 2d 510, 533 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050 (1980). A two-pronged foundation must be laid before such evidence is properly received in evidence; first, the item which is offered must be identified as being the same object involved in the incident at issue; second, it must also be shown that since the incident in which it was involved, the object has undergone no material change in its condition. *State v. Barfield*, *supra*. "The trial judge possesses and must exercise sound discretion in determining the standard of certainty that is required to show that the object which is offered is the same object involved in the incident in issue and that the object is in an unchanged condition." *State v. Barfield*, *supra* at 336, 259 S.E. 2d at 533.

In the present case, the State presented evidence that at around 9:30 p.m. on 15 January 1981 a man (identified as defendant) wearing a green army field jacket and wielding a .45 caliber automatic pistol demanded and received from the proprietor of the Little Giant Store the cash in the store's cash register, that this man was seen an hour later in a 1970 Camaro which had been spotted at the scene of the robbery, and that the Camaro, then occupied by defendant, contained within it a .45 caliber automatic pistol, a green army jacket, and \$89 in cash. The pistol was admitted into evidence after Officer Robert Johnston, the person who found the challenged articles in defendant's automobile, testified that it was the one he took out of the Camaro on 15 January 1981. Likewise, the green army jacket was admitted after Officer Johnston testified that it was the one he had removed from the automobile and that it had been in his possession or custody since 15 January 1981. Finally, the challenged currency was admitted after Officer Johnston testified that it was the currency he removed from the Camaro on 15 January 1981 and that it had been in his custody since that day. The State, therefore, laid a proper foundation authenticating the challenged articles as being the actual articles testified to as having been found in defendant's 1970 Camaro. Testimony that such articles were found in the

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defendant's car was admissible, even without presenting direct evidence that these articles were the very ones possessed by the culprit at the time of the crime; similarly, the articles which are the subject of such testimony, when properly authenticated as here, are themselves admissible as real evidence. This assignment of error is overruled.

[2] Defendant next assigns as error the court's permitting the jury, over his objection and without his consent, to take into the jury room two photographs of the interior of defendant's 1970 Camaro and the currency and pistol located therein, and another photograph of the Camaro, all of which were admitted into evidence.

G.S. § 15A-1233(b) permits a judge, when the jury so requests and all parties consent thereto, to allow the jury to take into the jury room exhibits and writings which have been received in evidence. In the present case, defendant objected to the jury's taking exhibits with it into the jury room and the court violated G.S. § 15A-1233(b) in allowing the exhibits to go into the jury room. Such statutory violations by the trial court, however, are corrected by the appellate division, only when they prejudice the defendant. G.S. § 15A-1442(6). Such prejudice obtains only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises; the burden of showing such prejudice is upon the defendant. G.S. § 15A-1443(a). Defendant has not even suggested how the court's allowing these photographs, which had already been submitted as evidence for the jury's consideration, into the jury room caused him any prejudice. This assignment of error has no merit. *See State v. Prince*, 49 N.C. App. 145, 270 S.E. 2d 521 (1980); *State v. Bell*, 48 N.C. App. 356, 269 S.E. 2d 201, *appeal dismissed and disc. rev. denied*, 301 N.C. 528, 273 S.E. 2d 455 (1980).

We hold defendant had a fair trial free of prejudicial error.

No error.

Judges HILL and BECTON concur.

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STATE OF NORTH CAROLINA v. JAMES ROBERT TODD, JR.

No. 8124SC731

(Filed 16 February 1982)

**Searches and Seizures § 37— search of jacket in vehicle—suppression of evidence improper**

The trial court erred in granting defendant's motion to suppress evidence obtained as a result of a search of his automobile where the evidence tended to show that a special agent arrested defendant pursuant to an arrest order for a drug violation; that the agent asked defendant to get out of his automobile and asked the defendant if he could search his vehicle for weapons; that the defendant gave him permission to do so; that as the agent was searching the passenger area of the vehicle, another officer handed him a jacket which had been on the front seat; and that a bag containing cocaine and \$2,500 in currency was removed from the pocket of the jacket. When an officer lawfully arrests a person who is in a motor vehicle, the officer has an absolute right to search the passenger area and any container found in the passenger area of the vehicle.

APPEAL by the State from *Griffin, Judge*. Order entered 6 March 1981 in Superior Court, WATAUGA County. Heard in the Court of Appeals 5 January 1982.

The defendant was indicted for possession of more than 28 but less than 200 grams of cocaine. He made a motion to suppress evidence obtained as a result of a search of his automobile. A hearing was held on this motion prior to trial at which the only evidence was the testimony of Robert B. Kaiser, a special agent with the State Bureau of Investigation. Mr. Kaiser testified that on 7 October 1980 he was notified by telephone and by printed message received on the PIN system at the Sheriff's Office in Watauga County that an arrest order for a drug violation had been issued for the defendant in Brunswick County. Mr. Kaiser knew the defendant and started searching for him.

On 8 October 1980 Mr. Kaiser stopped the defendant who was operating his vehicle in Watauga County. Mr. Kaiser arrested the defendant and asked him to get out of his automobile. Mr. Kaiser then asked the defendant if he could search his vehicle for weapons and the defendant gave him permission to do so. Mr. Kaiser stated he wanted to make an investigatory search of the entire vehicle including the trunk "for either contraband, or papers in connection with the Brunswick County charges and that



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is why I asked him for permission to search the car." He said he would have searched the interior of the vehicle whether or not he had received permission.

While Mr. Kaiser was searching the passenger area of the vehicle, an officer who was helping him in the search handed him a jacket which had been on the front seat of the automobile. Mr. Kaiser felt a soft object in the left pocket of the jacket. He testified he knew it was not a weapon and thought it was probably a bag of marijuana. He removed the object and it was a bag containing cocaine and \$2,500.00 in currency. Mr. Kaiser removed from the right pocket of the jacket a ledger containing figures, names, and weights.

At the conclusion of the hearing on the motion to suppress, the court found that after the defendant was arrested and removed from the vehicle, he was not in a position to reach the jacket; that the objects were not in plain view; and a search of the jacket was not a search incident to an arrest. The court found further that the consent to search was given without the defendant's being informed of what type of search Mr. Kaiser intended to make, the search was not for the purpose of making an inventory, and there were not exigent circumstances which would justify an immediate search of the defendant's jacket pockets. The court suppressed the admission into evidence of the items found by Mr. Kaiser as a result of the search of the jacket. The State appealed.

*Attorney General Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.*

*Steven A. Bernholz and Barry Nakell for defendant appellee.*

WEBB, Judge.

Pursuant to *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981), decided after this case was determined in superior court, we reverse. In *Belton*, the defendant and three companions were stopped by a trooper for speeding. The trooper removed all four persons from the vehicle when he smelled a distinct odor of marijuana emanating from the vehicle. After the defendant and the other occupants had been removed from the vehicle, the trooper arrested them for possession of marijuana.

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The trooper then searched the passenger area of the vehicle. He unzipped a pocket of a jacket which had been in the passenger area and found cocaine and the defendant's identification in the pocket. The United States Supreme Court held this evidence should not have been excluded under the Fourth Amendment to the United States Constitution. After some discussion as to the need for a workable and understandable rule in regard to searches incident to arrest, the Court said:

"Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment."

We believe the instant case is governed by *Belton*.

The defendant argues that *Belton* does not apply. He says there was one officer and four suspects in *Belton* while there were three officers and one suspect in this case. He contends this gave the officer in *Belton* more reason to search. He also argues that in this case, unlike *Belton*, the officers had completed the arrest before the search began. Finally, the defendant argues that Mr. Kaiser testified that the search was made to find contraband and this makes the rule of *Belton* inapplicable because the State has shown by its own evidence that the search was not incident to the arrest.

As we read *Belton*, none of the distinctions which the defendant makes are helpful to him. We believe that under *Belton* when an officer lawfully arrests a person who is in a motor vehicle, the officer has an absolute right to search the passenger area and any container found in the passenger area of the vehicle. The thrust of *Belton* is to establish a workable rule which does not require interpretation by a court at a later time as to the scope of the search. We believe this rule allows the search conducted by Mr. Kaiser in the instant case. See *State v. Cooper*, 304 N.C. 701, 286 S.E. 2d 102 (1982). We hold it was error to exclude from evidence the items found as a result of the search.

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Reversed and remanded.

Judges VAUGHN and HILL concur.

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STATE OF NORTH CAROLINA v. ULICE ARCHIE FUNDERBURK

No. 8126SC584

(Filed 16 February 1982)

**Criminal Law § 83.1; Constitutional Law § 33— competency of wife to testify against husband—retroactive decision**

In a prosecution for first degree murder and discharging a firearm into occupied property, testimony by defendant's wife as to what occurred at the time of the crimes was not rendered incompetent by G.S. 8-57 since the testimony did not involve a "confidential communication" between spouses. Furthermore, the retroactive application to this case of the rule announced in *State v. Freeman*, 302 N.C. 591 (1981), which limited the spousal disqualification of G.S. 8-57 to testimony involving confidential communications within the marriage, did not violate the *ex post facto* clause of either the United States or North Carolina Constitutions. Article I, Section 16 of the N.C. Constitution; Article I, Section 9 of the U.S. Constitution.

APPEAL by the state from *Gaines, Judge*. Order entered 5 January 1981, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 November 1981.

As the result of an incident which occurred on 18 May 1980, defendant was charged in two indictments with murder in the first degree and discharging a firearm into occupied property. Defendant's wife, Mattie Funderburk, witnessed the alleged crimes. Pursuant to G.S. 8-57 defendant, prior to trial, moved to suppress the proposed testimony of Mrs. Funderburk on the grounds that one partner to a marriage may not testify against his or her spouse in a criminal action. Evidence presented at hearing on the motion tended to show that defendant and his wife were married on 24 February 1968, and that although Mrs. Funderburk had filed a civil complaint in 1977 seeking an absolute divorce, no final decree had ever been issued.

The trial court found as a fact that Mattie Funderburk was defendant's lawful spouse, concluded as a matter of law that G.S. 8-57 applied to any proposed testimony by Mrs. Funderburk con-

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**State v. Funderburk**

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cerning the offenses with which defendant was indicted, and entered an order ruling her testimony incompetent.

The state and defendant stipulated that Mattie Funderburk would have testified she was operating a 1972 Pontiac at the intersection of Trinity Church Road and Beatties Ford Road in Mecklenburg County on 18 May 1980. John Lawson Bracy was a passenger, seated in the front passenger side of the automobile. Mrs. Funderburk testified in a preliminary hearing and gave statements setting forth the details of a shooting that occurred when defendant approached the Pontiac at the intersection on the day in question. Bracy was killed in the shooting.

The state excepted to the trial court's findings of fact, conclusions of law, and order. State appealed.

*Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the state.*

*Keith M. Stroud for defendant appellee.*

MORRIS, Chief Judge.

We note that the state did not file a record on appeal within the time stipulated by Rule 12(a) of the Rules of Appellate Procedure, and that it failed to ask for an extension of time to file from this Court. We will, however, suspend the requirement of Rule 12(a) and consider this appeal pursuant to our residual authority expressed in Rule 2 in order to prevent manifest injustice.

The central issue raised on appeal is whether the trial court erred in granting the defendant's motion to suppress the testimony of his wife, Mattie Funderburk. We find that G.S. 8-57 did not render incompetent the proposed testimony of Mrs. Funderburk in view of the North Carolina Supreme Court's recent decision in *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981).

The Supreme Court in *Freeman* modified the common law rule of general disqualification in criminal proceedings of the testimony of a spouse of a defendant involving confidential communications between spouse and defendant. Finding that "the common law rule no longer complies with the purposes for which it was created," Justice Copeland, for the Court, wrote:

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Henceforth, spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage.

*Id.* at 596, 276 S.E. 2d at 453. In determining whether the testimony includes a "confidential communication," the courts are to be guided by the Supreme Court's previous decisions interpreting that term under G.S. 8-56. The decisions define a confidential communication as one "induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *Id.* at 598, 276 S.E. 2d at 454. By limiting the spousal disqualification to testimony involving confidential communications within the marriage, the Court insured that the rule continued to serve its historical objective of promoting marital harmony, while prohibiting a defendant spouse from using the rule to inhibit the administration of justice. *Id.*

We find that Mrs. Funderburk's proposed testimony includes nothing which would render it incompetent under the rule of *Freeman* and the case law definition of "confidential communication."

The acts complained of in *Freeman* occurred on 5 June 1980. The defendant in the case *sub judice* allegedly shot Bracy on 18 May 1980. Defendant argues that retroactive application to this case of the rule as modified by *Freeman* would be tantamount to the imposition of an *ex post facto* law, violative of Article 1, Section 16 of the North Carolina Constitution and Article 1, Section 9 of the United States Constitution. He contends that the prohibition against the enactment of *ex post facto* laws applies to judicial as well as legislative action.

Our Supreme Court in *State v. Rivens*, 299 N.C. 385, 261 S.E. 2d 867 (1980); cited in *State v. Cooper*, 304 N.C. 701, 286 S.E. 2d 102 (1982), spoke directly to this question. There the Court held that there is no violation of the *ex post facto* clause of either the United States or North Carolina Constitution when a court decision is applied retroactively, because the clause applies to legislative and not judicial action. *State v. Rivens*, *supra*. Moreover, decisions are presumed to operate retroactively, and

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overruling decisions are given solely prospective application only when there is compelling reason to do so. *Id.*

We hold that the decision in *Freeman* applies retroactively to this case because there is no compelling reason why it should not apply, and that the trial court erred in concluding as a matter of law that Mattie Funderburk's proposed testimony was incompetent under G.S. 8-57. The order to suppress her testimony must be reversed and the case remanded for trial.

Reversed and remanded.

Judges HEDRICK and MARTIN (Robert M.) concur.

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LUCILLE HARRIS v. RONALD SCOTT HARRIS

No. 8117DC569

(Filed 16 February 1982)

**Divorce and Alimony § 25.10— modification of child custody—findings relating to mother's boyfriend—no sufficient change in circumstances**

There was no substantial change in circumstances to justify modification of a child custody order by transferring custody from the mother to the father where the evidence supported the court's finding that the mother had allowed a male friend to visit regularly in the evenings and to stay overnight at least once, but there was no evidence to support the court's finding that "this relationship, continued in the presence of the minor child, will have a future injurious effect upon the development and formation of the minor child's character, mental and emotional development."

Judge WEBB dissenting.

APPEAL by plaintiff from *Clark, Judge*. Order entered 2 March 1981 in District Court, SURRY County. Heard in the Court of Appeals 2 February 1982.

Plaintiff instituted this action on 6 August 1980 seeking, among other things, custody of Stacy Harris, a child born to the marriage of the parties on 1 October 1977, and a reasonable amount of child support. The parties were married on 12 June 1970 and separated in June 1980.

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**Harris v. Harris**

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On 3 November 1980, following a hearing, Judge Clark entered an order finding that both plaintiff and defendant were fit and suitable persons to have custody of the child but at that time the best interest of the child required that her custody be awarded to plaintiff. Custody was awarded to plaintiff, with visitation rights given to defendant who was ordered to pay \$40.00 per week child support. There was no appeal from that order.

On 14 January 1981 defendant filed a motion in the cause alleging that since the above mentioned order was entered, plaintiff had been committing adultery in the presence of the minor child and that plaintiff was no longer a fit and proper person to have custody of the child. Defendant asked that he be awarded custody.

On 2 March 1981 Judge Clark entered an order summarized in pertinent part as follows:

1. "That the plaintiff is dating Jimmy Nelson Gwyn on a regular basis and he is coming to plaintiff's premises regularly at night. That on at least one occasion, he stayed overnight, in the presence of the minor child. That this situation is presently injurious to the minor child with respect to the formation of her moral attitude and character and the Court finds as a fact that this relationship, continued in the presence of the minor child, will have a future injurious effect upon the development and formation of the minor child's character, mental and emotional development."

2. "That the custody of the minor child, STACY HARRIS, is hereby placed with the defendant for the next six months from the date of the signing of this Order, actual transfer of custody to be consistent with the other paragraphs in this Order pertaining to the evaluation. That the plaintiff shall have visitations during this period consistent with those alternate weekend visitations afforded the defendant in the Order of October 15, 1980, beginning Friday, March 13, 1981."

3. "That the defendant shall pay for a psychological evaluation of the minor child now and again in six months."

4. "That at the end of the six months period another evaluation shall be obtained at the defendant's expense of the

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**Harris v. Harris**

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aforesaid minor child. That said evaluation shall be by Dr. Drew Edwards or a competent psychologist of the aforesaid minor child. That the defendant shall retain custody of the minor child at that time until the evaluation is completed. Upon completion of the evaluation, the matter of custody shall be considered by this Court, after a hearing."

Plaintiff appealed from this order.

*Faw, Folger, Sharpe & White by Cama C. Merritt for the plaintiff-appellant.*

*Westmoreland, Sawyer & Miller by Gordon A. Miller for the defendant-appellant.*

MARTIN (Robert M.), Judge.

The question presented by this appeal is whether there was sufficient evidence of change of circumstances affecting the welfare of Stacy Harris to justify modification of a prior order placing her in the custody of her mother.

The entry of an Order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the Court may modify prior custody decrees. G.S. 50-13.7; *Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649; *In re Herring*, 268 N.C. 434, 150 S.E. 2d 775; *Stanback v. Stanback*, supra; *Thomas v. Thomas*, supra; *In re Means*, 176 N.C. 307, 97 S.E. 39. However, the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357; *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77; and *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227.

*Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974).

We do not think the trial court made sufficient findings of substantial change of circumstances to support the order transferring custody of the child from plaintiff to defendant. See *Todd v.*



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**Harris v. Harris**

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*Todd*, 18 N.C. App. 458, 197 S.E. 2d 1 (1973). While the court found that plaintiff had allowed a male friend to visit regularly in the evenings and at least once to stay overnight, we find nothing in the record to support the critical finding that "this relationship, continued in the presence of the minor child, will have a future injurious effect upon the development and formation of the minor child's character, mental and emotional development." The court failed to find that there was any adulterous relationship between plaintiff and said friend. *Id.* In its previous order the court found that both plaintiff and defendant were fit and proper person to have custody of the child; in the order appealed from the court made no finding that plaintiff had become an unfit person to have custody of the child.

For the foregoing reasons, the order appealed from is vacated and this cause is remanded for further proceedings not inconsistent with this opinion.

Remanded.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I believe the evidence and the finding of fact that the plaintiff had been dating a man and on at least one occasion that he had stayed with her overnight is sufficient to show a change in circumstances justifying the order of the District Court. The majority cites *Todd v. Todd*, 18 N.C. App. 458, 197 S.E. 2d 1 (1973). I do not believe it is precedent for this case. In *Todd* the court found the mother had allowed a man to stay with her before and after the first order for custody was made. This Court held that did not support a finding of change in circumstances so as to change custody. In this case there was not evidence the plaintiff had allowed a man to stay prior to the first order for custody.

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**Dixon v. Wall**

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**JACKIE DIANE DIXON v. SAMMY WALL**

No. 813SC566

(Filed 16 February 1982)

**Automobiles § 90.14— instruction on contributory negligence erroneous**

In an action for personal injury arising out of an automobile accident, the trial court erred in instructing that plaintiff would be contributorily negligent if "she failed to apply her brakes and slow her vehicle to stop after rounding a curve and observing a tractor" as by so charging, the court allowed the jury to find plaintiff contributorily negligent, even though she did not violate her duty of care under our case and statutory law.

APPEAL by plaintiff from *Winberry, Judge*. Judgment entered 23 January 1981 in Superior Court, PITT County. Heard in the Court of Appeals 2 February 1982.

This is an action for personal injury arising out of an automobile accident which occurred on 21 August 1979. The plaintiff's evidence tended to show that she was driving west on North Carolina Highway 102, a paved road near Calico. She testified she was going 30 miles per hour in a 55 mile zone because it was foggy and damp. After rounding a curve, she saw Bryan Avery, an employee of the defendant, driving a tractor pulling two trucks in an easterly direction in the east bound lane. She testified that she "kept on going because I didn't know he was going to turn in front of me. All at once he turned in front of me and I cut out to keep from hitting him." The plaintiff's automobile left the paved portion of the highway and struck a culvert in the defendant's front yard. She received personal injuries.

Bryan Avery testified that he did not see a car and that he stopped, looked both ways, and turned into the defendant's driveway at which time he heard a car sliding. He looked back and saw the plaintiff's car hit a tree. The defendant testified that he was following the tractor and the two trucks; that his estimate of the visibility in the fog was 100 to 150 yards; that he did not see any cars on the highway before Bryan Avery turned; and that the plaintiff's car started sliding after Bryan Avery began to turn.

The judge instructed the jury on the law of negligence and contributory negligence. In his final mandate, he charged on contributory negligence as follows:

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Dixon v. Wall

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"Finally, as to the contributory negligence issue, I instruct you that if the defendant has proved by the greater weight of the evidence that at the time of the occurrence which is the subject of this lawsuit that Jackie Diane Dixon, the plaintiff, was negligent in any one or more of the following respects . . . that she failed to apply her brakes and slow her vehicle to a stop after rounding a curve and observing a tractor . . . and if the defendant has further proved by the greater weight of the evidence that such negligence was a proximate cause of and contributed to the plaintiff's injury or damage, then it would be your duty to answer this issue yes, in favor of the defendant. On the other hand, if considering all of the evidence, the defendant has failed to prove such negligence or proximate cause, then it would be your duty to answer this issue no, in favor of the plaintiff."

The jury answered yes to the issues of negligence and contributory negligence. The plaintiff appealed.

*Gaylord, Singleton and McNally, by Louis W. Gaylord, Jr. and Danny D. McNally, for plaintiff appellant.*

*Speight, Watson and Brewer, by W. Walton Kitchin, Jr., for defendant appellee.*

WEBB, Judge.

The plaintiff presents two assignments of error. We consider one of them. The plaintiff assigns error to the court's instruction that she would be contributorily negligent if "she failed to apply her brakes and slow her vehicle to a stop after rounding a curve and observing a tractor." We believe this assignment of error has merit. The essence of this instruction is that when the plaintiff saw the tractor, she had to stop, even if it was within its own lane. The plaintiff had the right to assume, and to act on that assumption, that the driver of a vehicle approaching from the opposite direction would comply with statutory requirements before making a left turn across her path. *See Petree v. Johnson*, 2 N.C. App. 336, 163 S.E. 2d 87 (1968). There was evidence in the case sub judice that Bryan Avery gave no indication that he was going to turn and that the plaintiff did not have time to stop in order to avoid an accident when he did turn. By charging that the plaintiff had to stop when she saw the tractor, the court allowed the jury

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to find her contributorily negligent, even though she did not violate her duty of care under our case and statutory law. This error in the final mandate requires that we award the plaintiff a new trial. *See State v. Prince*, 49 N.C. App. 145, 270 S.E. 2d 521 (1980).

The defendant contends that the instruction was proper because it applied the law to the evidence that the plaintiff failed to apply her brakes when she saw Bryan Avery turn the tractor to enter the driveway. We cannot assume from this instruction that the jury would know the court intended that they would find the plaintiff contributorily negligent if they found she did not apply her brakes when she saw the tractor turn to enter the driveway.

New trial.

Judges MARTIN (Robert M.) and WELLS concur.

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CORBETT C. WARD, EMPLOYEE, PLAINTIFF v. BEAUNIT CORPORATION, EMPLOYER; AND LIBERTY MUTUAL INSURANCE COMPANY, AND/OR AMERICAN EMPLOYERS INSURANCE COMPANY, CARRIERS, DEFENDANTS.

No. 8110IC535

(Filed 2 March 1982)

**1. Master and Servant § 93.3— workers' compensation proceeding—expert medical testimony—history of plaintiff different from plaintiff's testimony**

In a proceeding to obtain compensation for disability allegedly resulting from byssinosis, the Industrial Commission erroneously concluded that the testimony of an expert medical witness as to the nature of plaintiff's illness was not competent because the history plaintiff gave the witness differed somewhat from plaintiff's testimony at the hearing and from plaintiff's statements in an insurance application since such conflicts bore only upon the weight to be given to the testimony of the witness, and the witness testified that such conflicts would make no difference in his diagnosis.

**2. Evidence § 50.1; Master and Servant § 93.3— workers' compensation proceeding—expert medical testimony—witness not treating physician**

In a proceeding to obtain compensation for disability allegedly resulting from byssinosis, the Industrial Commission erroneously concluded that the testimony of an expert medical witness as to the nature of plaintiff's illness

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was incompetent because the witness was not a treating physician but had merely examined plaintiff for diagnostic purposes where the witness's diagnosis was based not only upon the history given to him by plaintiff but more specifically upon his own objective examination and tests.

**3. Master and Servant § 97.1—workers' compensation—disability benefits—failure of Commission to consider competent evidence—remand**

An action in which the Industrial Commission denied plaintiff compensation for disability allegedly resulting from byssinosis must be remanded for further proceedings where the Industrial Commission erroneously failed to consider all the competent evidence adduced at the hearing as to what extent plaintiff's disability was caused by his occupational disease.

APPEAL by plaintiff from the Industrial Commission. Order and opinion entered by the Industrial Commission on 22 December 1980. Heard in the Court of Appeals 14 January 1982.

Defendant began working in a textile mill in 1925, and was employed in defendant Beaunit's textile mill in Rockingham from 1943 until he retired because of disability on 1 June 1974. During his employment with Beaunit, defendant was regularly exposed to cotton dust from 1925 through September 1966 and was again exposed to cotton dust from June to September of 1968. From September of 1968 until his retirement, plaintiff worked in synthetic fibers. Plaintiff began smoking when he was 13 years old and smoked 2 or 3 packs a week until he became disabled.

Plaintiff was treated by his family physician Hugh O. Queen, M.D., and was examined and evaluated by John S. Stevenson, M.D., and James E. Hemphill, M.D., a specialist in diagnostic radiology, and Charles D. Williams, Jr., M.D., a specialist in pulmonary disease and a member of the Industrial Textile Occupational Disease Panel.

At plaintiff's initial hearing on 17 October 1978, Deputy Commissioner William L. Haigh heard the testimony of plaintiff, Marie Williams, defendant Beaunit's office manager, and Charles White, who was superintendent of spinning in Beaunit's Rockingham plant. A further hearing was held on 28 March 1979 before Deputy Commissioner J. C. Rush to take the testimony of Dr. Williams. By stipulation of the parties, the initial evidentiary record included an eleven page pulmonary evaluation report by Dr. Williams, reports by Dr. Queen and Dr. Stevenson, and hospital records.

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On 14 December 1979, Deputy Commissioner Haigh entered an opinion denying plaintiff's claim. On appeal, the Full Commission remanded the matter for the purpose of taking the further testimony of Dr. Williams, which was accomplished at a hearing before Chief Deputy Commissioner Forrest H. Shuford on 22 August 1980. On 16 December 1980, the Full Commission entered an opinion in which it made additional findings of fact and conclusions of law and, as amended, adopted and affirmed Deputy Commissioner Haigh's order. On 22 December 1980, the Full Commission entered a second opinion in which it amended its 16 December 1980 opinion. This had the effect of further amending Haigh's opinion, and otherwise affirming it.

Plaintiff testified in detail as to the conditions at defendant Beaunit's mill during his employment there. His testimony shows that he was regularly exposed to substantial amounts of cotton dust over a period of about 40 years, his last exposure being in 1968. Plaintiff testified that he had to quit work in May of 1974 because of breathing difficulties. He had first started having these problems the previous winter, then he noticed a cough a few months before he quit work and then he noticed shortness of breath a month before he quit. Plaintiff visited Dr. Queen for treatment for his breathing difficulties and Dr. Queen advised him to stop working. Plaintiff also testified that he smoked cigarettes for about 50 years.

Dr. Queen, plaintiff's attending physician, stated in his June, 1974 reports that plaintiff was suffering from emphysema and osteoarthritis of the lumbar spine. A hospital discharge report covering plaintiff's hospitalization from 3 June 1974 to 4 June 1974, showed plaintiff's primary diagnosis as lumbar strain, advanced osteoarthritis of the lumbar spine, with a secondary diagnosis of mild emphysema. A subsequent report by Dr. Queen, covering plaintiff's hospitalization from 14 August 1974 to 15 August 1974, showed plaintiff's primary diagnosis as chronic obstructive lung disease, with secondary diagnosis of hyperlipidemia and arteriosclerotic heart disease. Dr. Queen's 24 hour note on plaintiff's hospital admission contained the following pertinent statements:

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8-14-74

This 62 year old white male was admitted here for evaluation of chest pain and emphysema, which had been detected earlier on a previous admission some 2 months ago. Since his last admission he has felt considerably better and has lost several pounds and is breathing much better.

. . .

X-ray of the chest is unchanged since 6-4-74 and the thoracic aorta is ectatic with prominence of the ascending portion suggestive of hypertensive changes and other changes consistent with pulmonary emphysema.

. . .

Electrocardiogram showed normal sinus rhythm with poor progression of the R wave in Lead V1-V3, with a strong possibility of old antero-septal wall infarction.

. . .

DISCHARGE DIAGNOSIS: CHRONIC OBSTRUCTIVE LUNG DISEASE. HYPERLIPIDEMIA. ARTERIOSCLEROTIC HEART DISEASE.

DR. H. O. QUEEN

Dr. Hemphill's report of 4 August 1974 stated that plaintiff's "[L]ungs show bilateral diffuse pulmonary emphysema but no recent pulmonary infiltration" and also described plaintiff's lumbar spine condition.

Dr. Queen's history and physical report of 27 September 1976 contains the following pertinent entries:

HISTORY & PHYSICAL  
9-27-76

CHIEF COMPLAINT: Chest pain and anxiety.

PRESENT ILLNESS: About 12 hours before admission he became acutely anxious and soon began wheezing and coughing. . . .

PAST HISTORY: He has a long history of severe chronic obstructive lung disease with asthma and angina on moderate exertion due to arteriosclerotic heart disease. He has had a[t]

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(sic) least 1 documented myocardial infarction. He also has rather marked generalized osteoarthritis involving all of his peripheral joints and spine.

. . .

MYOCARDIAL ISCHEMIA.

ARTERIOSCLEROTIC HEART DISEASE.

CHRONIC OBSTRUCTIVE LUNG DISEASE.

ANXIETY.

At the request of defendant Liberty Mutual, Dr. Williams examined plaintiff on 8 May 1978. At the 28 March 1979 hearing, Dr. Williams testified that his examination involved taking a medical history, a physical examination, blood tests, pulmonary studies, chest x-rays, and an electrocardiogram. All of his pertinent findings were included in his report, which was stipulated into evidence. In his report he testified that he diagnosed plaintiff as having byssinosis Grade III, pulmonary emphysema, and chronic bronchitis. In his opinion, these diseases he diagnosed in plaintiff were due to causes and conditions peculiar to plaintiff's employment to which the general public is not equally exposed outside of the employment. In his opinion, plaintiff was totally and permanently disabled in his ability to work for wages. Dr. Williams testified that plaintiff's lung diseases were probably caused by exposure to cotton dust, but he also testified that plaintiff's post-1968 employment in synthetic production under dusty conditions aggravated plaintiff's symptoms, caused him to be worse (sic), and that exposure to that dust was harmful.

In his report, which was stipulated into evidence at the 8 May hearing, Dr. Williams indicated that he had diagnosed other diseases affecting plaintiff's ability to work. He was asked nothing about these findings, either on direct or cross-examination. His findings were summed up in the discussion part of his report, as follows:

It is the opinion of this examiner that the individual does have byssinosis, this diagnosis being based on typical symptoms of chest tightness and dyspnea on exposure to occupational dust with Monday Morning exacerbation. In addition, he has the usual clinical x-ray and pulmonary function findings of chronic obstructive pulmonary disease. Undoubtedly, cigarette smoking is a contributory factor in the production



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of his pulmonary emphysema and chronic bronchitis. It is not possible to state what percentage of his disability resulted from various contributory factors.

The individual is totally disabled from work due to a combination of chronic obstructive pulmonary disease and arteriosclerotic heart disease with angina pectoris. He would, (sic) not in my opinion, be able to perform work outside of exposure to irritating inhalants. Using a very rough approximation, it is estimated 50% of his disability might be due to dyspnea resulting from chronic obstructive pulmonary disease and 50% from exertional chest pain resulting from arteriosclerotic heart disease.

At the 22 August hearing, Dr. Williams substantially reiterated his previous testimony as to the nature of plaintiff's lung disease, but modified his previous testimony by testifying that plaintiff's exposure to synthetic dust was not harmful. On cross-examination, Dr. Williams testified as to the contents of his report dealing with plaintiff's other diseases, testified that plaintiff's heart diseases were sufficient in themselves to disable plaintiff, and that plaintiff's smoking probably caused his emphysema and his chronic bronchitis, but that plaintiff's bronchitis could have been "occupational".

Deputy Commissioner Haigh entered an opinion in which he concluded that plaintiff had failed to establish that he had the occupational disease byssinosis and denied any award. On appeal, the Full Commission revised Deputy Commissioner Haigh's order by amending one finding of fact and by entering a different conclusion of law. These will be discussed in the body of our opinion.

Plaintiff has appealed the order of the Full Commission denying his claim.

*Hassell and Hudson, by Robin E. Hudson, for plaintiff-appellant.*

*Mason, Williamson, Etheridge & Moser, P.A., by James W. Mason, for defendant-appellee Liberty Mutual Insurance Company.*

*Young, Moore, Henderson & Alvis, by William F. Lipscomb, for defendant-appellee American Employers Insurance Company.*

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WELLS, Judge.

Under the provisions of G.S. 97-86, the Industrial Commission is the fact finding body, and findings of fact made by the Commission are binding on appeal if supported by competent evidence. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981); *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). In making its findings of fact, however, it is the duty of the Commission to consider, weigh, and evaluate all of the competent evidence before it. *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 262 S.E. 2d 830 (1980); *disc. rev. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980). In making its findings of fact, the Commission may not ignore, discount, disregard or fail to properly weigh and evaluate any of the competent evidence before it. *Harrell*, *supra*. The Commission has failed in this aspect of its duty in this case and the case must therefore be remanded.

To begin our analysis, we note that the opinion consists of three main sections, labeled as "findings of fact," "comment" and "conclusions of law." The findings of fact include much mere recitation of evidence which does not rise to the level of fact finding. The findings of fact include conclusions. The "comment" portion includes referrals to the evidence, findings of fact, discussions of case law, and conclusions. Opinions from the Commission written in this way make appellate review more challenging than it perhaps need be.

In the first 18 findings of fact, the opinion deals generally with plaintiff's employment and health history, his regular exposure to cotton dust in his employment for about 41 years, his smoking habits, and the onset of plaintiff's breathing difficulties in early 1974. The problems begin with finding of fact 19, where the opinion begins to deal with the testimony of Dr. Williams, and continue in findings 21, 23 and in the findings and conclusions reached in the "comment" section of the opinion. Because of the nature of the errors reflected in the opinion, we find it appropriate to quote at some length:

19. On 5-8-78, plaintiff was seen by Dr. Charles Williams, Jr. for pulmonary evaluation. His report indicates that plaintiff gave a history of gradual onset of dyspnea beginning about 1974, that at the present time he becomes short of

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breath on walking approximately one city block on the level, that he had had some chronic cough and production of sputum for about eight years and that he had no history of asthma but had had frequent wheezing. Plaintiff gave a further history of, among other things, working for 49 years, mostly with cotton but some flax also and synthetic materials and having worked in the card room approximately 30 out of the 49 years, retiring in May 1974. In addition, for the last 4-5 years of work he noticed some chest tightness and shortness of breath related to occupational dust exposure. It was further reported that he stated this was definitely worse on Monday and would become improved later in the week, that as time went by his symptoms were as severe on one day of the week as another and that he also had frequent nasal congestion for several years. *To the extent that this history given by plaintiff is in conflict with or not corroborative of the facts as heretofore found, it is not accepted as competent credible evidence.* (Emphasis supplied)

. . .

21. In the "Discussion" section of his report, Dr. Williams stated:

"It is the opinion of this examiner that the individual does have byssinosis, this diagnosis being based on typical symptoms of chest tightness and dyspnea on exposure to occupational dust with Monday morning exacerbation. In addition, he has the usual clinical X-ray and pulmonary function findings of chronic obstructive pulmonary disease. Undoubtedly, cigarette smoking is a contributory factor in the production of his pulmonary emphysema and chronic bronchitis. It is not possible to state what percentage of his disability resulted from various contributory factors. . . ."

Dr. Williams was of the further opinion that plaintiff is totally disabled from work due to a combination of chronic obstructive pulmonary disease and arteriosclerotic heart disease with angina pectoris and that he is not able to perform work outside of exposure to irritating inhalants. Dr. Williams estimated that 50% of plaintiff's disability might be due to dyspnea resulting from chronic obstructive pulmonary disease and 50% from exertional chest pain resulting from

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arteriosclerotic heart disease. *Dr. Williams' report, including his assessment regarding byssinosis is without probative force or evidentiary value inasmuch as two of the principal bases thereof are not supported by credible evidence of record.* (Emphasis supplied)

. . .

23. Plaintiff's disability is not due to an occupational disease caused by exposure connected with and arising out of his employment by the defendant-employer, but rather is due to arteriosclerotic heart disease, remote anterior myocardial infarction and angina pectoris compensated, none of which was caused by any element connected with the employment of plaintiff by the defendant-employer.

COMMENT

In reaching the decision in this case, the undersigned has carefully considered the evidence of record and the conflicts therein. In particular, careful consideration has been given to the evidence relating to the periods of exposure to cotton dust.

"Full fact-finding authority is vested in the industrial commission. G.S. 97-84. In exercising this authority, the industrial commission, like any other trier of facts, is the sole judge of the credibility and weight of the evidence. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515. As a consequence, it may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265." *Moses v. Bartholomew*, 238 N.C. 714, (1953).

In addition, the undersigned notes that although Dr. Williams' report was stipulated as that which he would testify to, *said report with respect, in particular, to the assessment regarding byssinosis is without probative force or evidentiary value inasmuch as two of the principal bases thereof are not supported by credible evidence of record.* (Emphasis supplied) On the one hand, plaintiff testified at the hearing that he first had breathing trouble in the winter of 1973-1974, whereas the history given to Dr. Williams

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reflected onset of chronic cough for about eight years and some chest tightness and shortness of breath for the last 4-5 years of work. Furthermore, the credible evidence establishes that plaintiff was last exposed to cotton dust in September 1968, whereas the history given reflects plaintiff having worked for 49 years mostly with cotton but also some flax and synthetic materials. *In view of the facts found concerning periods of exposure to cotton dust and the onset of plaintiff's breathing difficulties, the undersigned is constrained to conclude that there is no competent credible medical evidence of sufficient probative force or evidentiary value which would tend to establish that plaintiff has an occupationally related pulmonary disease.* (Emphasis supplied)

As recognized in *State v. Wade*, 296 N.C. 454 (1979), a treating physician may give his opinion on the basis of history supplied by his patient and may testify to the facts, including said history, upon which that opinion was based and as pointed out in *State v. Bock*, 288 N.C. 145 (1975), the Court citing *Penland v. Coal Co.*, 246 N.C. 26 (1957), the physician's opinion is not ordinarily inadmissible because it is based wholly or in part on statements made to him by the patient ". . . if those statements are made in the course of professional treatment and with a view of effecting a cure or during an examination for the purpose of treatment and cure.. . . In such a situation it is reasonable to assume that the information which the patient gives the doctor will be the truth, for self-interest requires it." Furthermore, even where the patient's statements are inherently reliable, such as when given to a treating physician, they are not admissible as substantive evidence and thus do not constitute factual evidence unless corroborated by other competent evidence. *Wade, Supra.*

Of significance to the instant case, the Court in *Bock* went on to hold that the witness's testimony therein was incompetent, the witness not having examined the defendant for purposes of treatment as a patient but rather for the purpose of testifying as a witness for the defendant at trial. The Court noted that in the latter situation, the motive which ordinarily prompts a patient to tell his physician the truth is absent.

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*Considered in view of the above and except for the stipulation of the parties, Dr. Williams' opinion and the history upon which it was based would have been incompetent. Not only was the history itself not inherently reliable inasmuch as Dr. Williams saw plaintiff for evaluative purposes rather than treatment, but also the facts upon which be (sic) based his opinion were not corroborated by plaintiff's testimony.*

*With respect to the effect of the failure of defendants to object to otherwise incompetent evidence, Dr. Williams' report having been stipulated without limitation with respect to the history given, or his opinion based thereon, the undersigned is of the opinion that he must consider said evidence and accord it its full probative force. Bishop v. DuBose, 252 N.C. 158 (1960) and Ballard v. Ballard, 230 N.C. 629 (1949). However, such evidence has no more probative value than it would have had if it had been admissible under established rules of evidence. Caudill v. Insurance Co., 264 N.C. 674 (1965). (Emphasis supplied)*

The record in this case also reflects that defendants through counsel timely objected to, among other things, several hypothetical questions posed to Dr. Williams by plaintiff's counsel at the hearing before Deputy Commissioner John Charles Rush 3-28-79, in Charlotte. Ruling thereon was deferred by Deputy Commissioner Rush to the undersigned, the original hearing officer herein. Upon careful review of the evidence herein, the undersigned is constrained to conclude that said objections should be and they are hereby sustained. One hypothetical question assumed as facts that, among other things, the mill ran mostly cotton and some flax during the latter portion of working and five to six years ran blends of synthetic with some cotton and some flax also cotton, and that about 10 years before plaintiff quit, he first noticed symptoms of coughing, shortness of breath. The above-referenced assumed facts are substantially different from the competent credible evidence of record concerning the period of exposure to cotton dust and the onset of symptomatology. The other hypothetical question, apparently assuming the same facts as the previous one except that in the last several years of work the portion of cotton flax to the material run

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was smaller than in the other area but nonetheless dusty, required dust and that dust aggravated the plaintiff's symptoms and caused him to be worse, was similarly defective. The undersigned concludes that these questions were fatally defective and improper in view of plaintiff's last exposure to cotton dust having been in 1968 and his first having breathing problems in the winter of 1973.

[1] The opinion is affected by errors of law in three respects. First, it reflects the erroneous conclusion that Dr. Williams' testimony as to the nature of plaintiff's illness was not competent because the history plaintiff gave Dr. Williams differed somewhat from plaintiff's history as reflected in plaintiff's testimony and in statements made by plaintiff in an insurance application. These conflicts, such as they were, do not affect Dr. Williams' competency, but bear only upon the weight to be given the testimony of Dr. Williams. We also note that the findings as to conflict in the evidence are not supported by the evidence. The opinion confuses plaintiff's history of cough and breathing difficulties, two very different manifestations of respiratory disease. Both plaintiff's testimony and Dr. Williams' report show that plaintiff's onset of dyspnea was in early 1974; both show that plaintiff's coughing symptoms appeared much earlier. Finally, we note that Dr. Williams testified that in his opinion, such differences as there were between plaintiff's testimony and the history which plaintiff gave him would make no difference in his diagnosis.

Dr. Williams' testimony on cross-examination was as follows:

Q. Now, the fact that he did not report any breathing problems until 1974 or the latter part of 1973, would you have anticipated that if this disease was aggravated, that it would have activated his symptoms, that he would have had some breathing problems? Would this have been a normal reaction?

. . .

THE WITNESS: No. I am not particularly troubled by that. I think that the development of the disease is a long-term insidious process. I think whether patients report symptoms or not is subject to a great deal of individual susceptibility and interpretation. I think the symptoms are first brought to the forefront when the patient develops an inter-

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current respiratory tract infection such as influenza, chest cold, and for the first time, the symptoms of this underlying insidious disease are brought to their attention.

In *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), our Supreme Court stated: "It is . . . clear that our legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim". The clear import of this statement as applied to the facts of this case is that a claimant is not required to be entirely consistent in how he gives his history, in laymen's terms, at hearing with how he communicates his history and timing of his symptoms to his doctor. We find no fatal inconsistency underlying Dr. Williams' clear and unequivocal diagnosis of byssinosis.

[2] Second, the opinion reflects the erroneous conclusion that Dr. Williams' testimony was not competent or of probative value or force because he was not a treating physician and had merely examined plaintiff for diagnostic purposes. Such a conclusion fails to recognize the implications of the opinions of our Supreme Court in *Taylor v. Stevens & Co.*, supra; *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979) and numerous other pertinent decisions of our appellate courts in Workers' Compensation cases which post-date *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957), giving judicial recognition to the need for and validity of medical testimony provided by examining physicians. Commissioner Haigh's opinion fails to recognize the distinguishing aspects of *Penland*, where the examining physician's disputed testimony was based not on objective findings, but upon subjective statements made to him by his patient, the plaintiff in that case. It fails to recognize the implications of the opinion of our Supreme Court in *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1978), where the Court held a physician's examination to be reliable because it was a thorough, carefully designed attempt to gain an understanding of the subject's state of mind. We quote the statement dispositive of the question here:

Dr. Malony did not rely for his conclusions on any one statement by defendant or on any particular fact he disclosed. In-



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stead he took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it.

It is obvious here that Dr. Williams' diagnosis was based not only upon the history plaintiff gave him, but more specifically upon his own objective examination and tests. We may take judicial notice that in many industrial disease cases, the testimony of a non-treating physician is necessary to establish the cause of a claimant's disability. Indeed, the Workers' Compensation Act itself recognizes the validity of such evidence. See G.S. 97-69 through G.S. 97-73; *Harrell v. Stevens & Co.*, supra. If allowed to stand, the conclusion reached in the opinion under review here would be massively disruptive of the orderly disposition of Workers' Compensation claims, especially in industrial disease claims.

Third, the opinion concludes that portions of Dr. Williams' testimony should not have been allowed because the hypothetical question on which his testimony was based included certain facts not in evidence. The questions alluded to in the conclusion refer to questions asked of Dr. Williams at the 28 March 1979 hearing. The hypothetical put to Dr. Williams at the subsequent hearing on 22 August 1980 asked him to assume facts found in the original opinion; thus, it is obvious that these conclusions have no pertinence to a final opinion. The Commission did nothing to correct these erroneous conclusions in Deputy Commissioner Haigh's opinion, but adopted and affirmed them intact. Thus, we cannot determine whether the Commission, in denying plaintiff's claim, was influenced by these errors in Deputy Commissioner Haigh's conclusions.

[3] In reaching its conclusions adverse to plaintiff's claim, the Commission obviously failed to consider all the competent evidence adduced at the hearing as to what extent plaintiff's disability was caused by his occupational disease, *Wood v. Stevens & Co.*, supra; *Harrell v. Stevens & Co.*, supra, and therefore this matter must be remanded for such further proceedings as are necessary and consistent with this opinion.

Reversed and remanded.

Judges MARTIN (Robert M.) and WEBB concur.

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**In re Smith**

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IN THE MATTER OF: SHARON DENISE SMITH, DATE OF BIRTH: 6/2/70;  
CHRISTOPHER MICHAEL SMITH, DATE OF BIRTH: 12/12/72

No. 8114DC625

(Filed 2 March 1982)

**1. Parent and Child § 1— termination of parental rights—statute used to define abandonment**

The trial court did not err in referring to N.C.G.S. 7A-517 when defining "abandonment" as section 7A-278 referred to in 7A-289.32(2) was repealed and reference is now made to N.C.G.S. § 7A-517(21) in the N.C. Juvenile Code.

**2. Parent and Child § 1; Rules of Civil Procedure § 15.2— amendment of complaint—additional ground for termination of parental rights**

Petitioner was properly allowed to amend its complaint to add G.S. 7A-289.32(3) as a ground for termination of parental rights where petitioner's evidence and the testimony elicited by respondent on cross-examination brought the amendment within G.S. 1A-1, Rule 15(b), Amendments to Conform to the Evidence.

**3. Evidence § 29.2; Parent and Child § 1— termination of parental rights—evidence within business records exception—testimony of social workers admissible**

In a hearing to terminate parental rights, testimony of two social workers, who had not worked on respondent's case until after the petition to terminate rights had been filed, was competent even though the witnesses had no firsthand knowledge of the events that took place between 1970 and the date when they assumed responsibility of the case. Each had familiarized herself with the case history of the client based on the records kept by the department of social services, and these records were admissible under the business records exception to the hearsay rule.

**4. Parent and Child § 1— termination of parental rights—sufficiency of evidence**

The trial court's conclusion that respondent's rights to her children be terminated was supported by clear, cogent and convincing evidence where the evidence tended to show that respondent had been in continuous contact with the department of social services over nearly a ten-year period; that the department tried to stimulate respondent's initiative to contact her children through an intensive provision of services; and that respondent completely failed to maintain any meaningful contact with her children. N.C.G.S. § 7A-517(21) and N.C.G.S. § 7A-289.32(3).

**5. Parent and Child § 1— termination of parental rights— statute constitutionally applied**

In a proceeding to terminate parental rights, the applicable statutes were constitutionally applied where the evidence amply supported not one but several of the statutory grounds required to terminate parental rights. N.C.G.S. 7A-289.31(a).

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In re Smith

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**6. Parent and Child § 1— termination of parental rights— indigent parent— costs of transcript to Legal Assistance Program**

The trial court erred in providing a copy of the transcript to counsel without cost to respondent in a proceeding to terminate parental rights where the Legal Services Corporation made a determination of indigency and undertook to represent respondent. The cost of the transcript should have been taxed to the North Central Legal Assistance Program.

APPEAL by respondent from *LaBarre, Judge*. Order signed 13 January 1981 in District Court, DURHAM County. Heard in the Court of Appeals 10 February 1982.

Respondent appeals from an order terminating parental rights with respect to her two minor children, Sharon Denise and Christopher Michael. The record reflects ten years of continuous efforts by petitioner in working with Miss Smith and the two children. However, because of the seriousness of the court's action in this case, we feel compelled to set out in some detail the facts giving rise to the decisions—facts which speak in stark language of the financial burden on the public and the physical dangers and emotional trauma to the children involved, when the right to parenthood is exercised without the concomitant ability and willingness to accept the responsibility.

Sharon Denise Smith was born out of wedlock on 2 June 1970. Her father executed an affidavit of paternity, but has never contributed to the child's support. He is presently serving three consecutive life sentences for convictions of kidnapping, rape, and armed robbery. Just prior to Sharon's birth, Miss Smith had been hospitalized for tuberculosis. She refused to sign a boarding home agreement so that the baby could be treated or remain separate from the mother during the incubation process for tuberculosis. In her first year Sharon was hospitalized for pneumonia and, after a second complaint was received concerning the baby's health, she was again hospitalized for severe diaper rash. She showed signs of neglect and deprivation. In an order dated 4 June 1971, Sharon was placed in the legal custody of the Durham County Department of Social Services, an action necessary upon the court's finding of neglect and the mother's failure to respond to services offered by Social Services or the Durham County Health Department.

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Sharon has been living in foster homes since 1971. Miss Smith did not ask to visit, did not visit, and never saw her daughter between 1971 and 1977.

Christopher Michael Smith was born 12 December 1972. He was placed in the legal custody of the Durham County Department of Social Services by order dated 18 April 1973, after having been hospitalized for the treatment of burns on his thighs and legs. Miss Smith was unable to give a satisfactory explanation for the injuries. Christopher, too, was born out of wedlock and the putative father has not established paternity, legitimized him, or provided financial support. Christopher has been living in foster homes since 1973. Miss Smith did not see the child again until June 1980.

On 25 June 1979, Nancy Dunham, a social worker in the foster care unit of the Durham County Department of Social Services, instituted an action to terminate parental rights in order that the children might be placed in the full custody of the department for adoptive placement.

Nancy Berson testified at the termination hearing that she had become the active social worker on the Smith case in February of 1980. She was aware that the action to terminate parental rights had been filed but

felt a need to make further effort because an action for termination of parental rights does not mean that termination will be granted; we have a responsibility to continue to try to work with the parent. We have no desire to see termination occur; it is not a goal of ours. If we can do anything to avert it, even at the last minute, we're going to do that.

Miss Berson set up three visits between Miss Smith and the children. Prior to this time she had written Miss Smith twelve letters. Miss Smith had missed seven appointments. Miss Berson testified that Miss Smith came to see her about public assistance. She did not ask about visits with the children. She did not mention the children. Miss Berson initiated the three visits. After the third visit, Miss Berson informed Miss Smith that "it was time for her to show some responsibility" and that the call regarding the next visit would have to be initiated by the mother. This the respondent failed to do.

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In a further effort to assist Miss Smith, Miss Berson wrote up a basic plan which, if complied with, might ensure the return of the children to the mother. The plan included attending "parenting" classes, visiting the children, meeting with the social worker regularly, and undergoing testing. Miss Smith did not visit the children, did not attend "parenting" classes, although transportation was offered, and failed to meet with the social worker regularly. There was testimony that since the children had been placed together in the last foster home, Miss Smith has seen them at church.

Testimony indicated that the children did not know who their mother was, but that "it is not uncommon for children who have been in foster care to be confused about who their mother is"; that Sharon has been moved five times and Christopher has been moved three times; and that Sharon has spent ninety percent of her life in foster care and Chris ninety-seven percent of his. The children are both adoptable, although Sharon's emotional problems may make her more difficult to place.

Miss Smith's testimony included the following statements:

There has not been a time since 1971 that I haven't had a social worker that I could call if I needed help. I did not call any of the social workers in regards to seeing my children because during that time I did not have use of phone, even if I wanted to. The times I went to Social Services . . . I had to walk. Walking up there did not keep me from asking about my children. I do not know why I did not ask about them. . . . I wanted to get my life in order.

\* \* \* \*

I do not have any reason for not asking for the children to come back home with me or for me to visit with them, but I wanted them to.

. . . [Chris] was three months and has never seen me as his mother. Chris was in the hospital with burns and they did ask the court to terminate my rights, but the Judge said that he thought I made some effort and would not terminate my rights. He gave me another chance but I didn't take it.

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Miss Smith is now thirty-five years of age. She has never been employed. In 1978 she was hospitalized for severe depression and later for "an overdose of aspirin."

*Thomas Russell Odom for petitioner appellee.*

*John C. Randall, Guardian Ad Litem, appellee.*

*North Central Legal Assistance Program, by Leowen Evans, for respondent appellant.*

MARTIN (Harry C.), Judge.

Respondent first contends that the trial court erred in failing to grant her motion to dismiss, arguing that petitioner "failed to submit sufficient evidence to establish a ground by which parental rights could be terminated." Respondent argues that (1) petitioner's witnesses had no first-hand knowledge of the facts in controversy; (2) petitioner relied extensively on inadmissible foster care records; and (3) petitioner relied upon inadmissible findings of fact from prior judicial proceedings. Respondent further argues that the court's conclusions of law were not supported by clear, cogent and convincing evidence, and finally that the termination of parental rights violated her right to family integrity without due process of law. We do not agree.

The statute provides in pertinent part:

*Grounds for terminating parental rights.*—The court may terminate the parental rights upon a finding of one or more of the following:

. . . .

(2) The parent has abused or neglected the child. The child shall be deemed to be . . . a neglected child within the meaning of G.S. 7A-278(4).

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services . . . to encourage

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the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

N.C. Gen. Stat. § 7A-289.32 (Cum. Supp. 1979).

[1] We first direct our attention to respondent's contention that the court "used the wrong statute in defining 'abandonment.'" The court's reference to N.C.G.S. 7A-517 is entirely correct. As is pointed out in the Editor's Note to N.C.G.S. 7A-289.32 (1981), section 7A-278 referred to in 7A-289.32(2) was repealed and reference is made to the North Carolina Juvenile Code, including the following definition:

(21) Neglected Juvenile. A juvenile who does not receive proper care, supervision, or discipline from his parent . . . or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare . . .

N.C. Gen. Stat. § 7A-517(21) (Cum. Supp. 1979).

This language tracks the language appearing in former N.C.G.S. 7A-278(4). Thus the definition of neglect, including abandonment, appeared in the statutes prior to the filing of this petition. The reference numbers were changed as a result of the recodification of the juvenile code.

[2] Respondent also objects to the inclusion of N.C.G.S. 7A-289.32(3) as a ground for termination of her parental rights. The record shows that at the close of its evidence, petitioner moved to amend the complaint to add this statutory ground. The court allowed the motion pursuant to Rule 15 of the North Carolina Rules of Civil Procedure, finding that the allegations in the complaint put respondent on notice that the provisions in both N.C.G.S. 7A-289.32(2) and (3) would provide grounds for the termination. We find, too, that petitioner's evidence and the testimony elicited by respondent on cross-examination bring the amendment within N.C.R. Civ. P. 15(b), Amendments to Conform to the Evidence.

Based on the testimony contained in the record before us, we find that petitioner offered sufficient evidence to establish

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grounds for termination of parental rights under both N.C.G.S. 7A-289.32(2) and (3). Respondent, however, challenges the admissibility of the testimony on three separate evidentiary theories.

[3] Petitioner offered the testimony of Kathy Brock and Nancy Berson, both of whom were social workers with the Durham County Department of Social Services. Neither of the two witnesses had worked on the Smith case until after the petition had been filed. Thus, argues respondent, their testimony was incompetent on matters occurring prior to their first contact with respondent. While it is true that the witnesses had no firsthand knowledge of the events that took place between 1970 and when they assumed responsibility of the case, each had familiarized herself with the case history of the client based on the records kept by the department of social services. Those records were admissible under the business records exception to the hearsay rule. 1 Stansbury's N.C. Evidence § 155 (Brandis rev. 1973). Witness Brock testified that the records were made in the regular course of business, at or near the time of the transactions involved. Respondent's counsel moved for an order compelling petitioner to produce its files and records pertaining to the matter, which motion was granted. Respondent referred to the records in her cross-examination of the witnesses in order to elicit facts favorable to her position. Finally, the records are corroborative of stipulated facts and the testimony of the respondent herself. Respondent's counsel stipulated that the court might take judicial notice of the finding of neglect with respect to both children made by the previous trial court.

In short, the court was correct in recognizing that this case could not be decided in a vacuum. The procedural and factual history of the case was relevant and necessary to a full and fair determination of the issues.

[4] Respondent argues that the trial court's conclusion that her rights to the children be terminated was not supported by clear, cogent and convincing evidence. We cannot agree. We consider respondent's continuous contact with the department of social services over nearly a ten-year period, its effort to stimulate her initiative through an intensive provision of services, and her complete failure to maintain any meaningful contact with the



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children, clear evidence that respondent "willfully left the [children] in foster care for more than two consecutive years without showing . . . that substantial progress [had] been made . . . in correcting those conditions which led to the removal of the [children] for neglect." N.C. Gen. Stat. § 7A-289.32(3) (Cum Supp. 1979). In addition, we find clear evidence that respondent abandoned the children as contemplated by N.C.G.S. § 7A-517(21).

"abandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child . . . .

"Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. *It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child . . . .*"

*In re Cardo*, 41 N.C. App. 503, 507-08, 255 S.E. 2d 440, 443 (1979) (emphasis ours).

Moreover, respondent failed to except to findings of fact 54 and 55. These findings are in the language of N.C.G.S. 7A-289.32, establishing grounds for terminating respondent's parental rights. By failing to except to the findings of fact, they are deemed to be supported by competent evidence and are conclusive on appeal. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962); *Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 253 S.E. 2d 494 (1979). Nevertheless, because respondent did except to conclusions of law 1 and 2, which are identical to findings of fact 54 and 55, we have made the foregoing analysis of the evidence.

We hold the findings of fact are supported by clear, cogent, convincing and competent evidence. They are, therefore, conclusive upon appeal. *Whitaker v. Everhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 254 S.E. 2d 658 (1979). The findings sustain the conclusions of law and the judgment entered.

[5] Respondent's final argument that her constitutional right to family integrity and companionship of her children has been

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violated is without merit. Respondent does not contend that the statute is unconstitutional, but that it was unconstitutionally applied in this case, because the evidence did not establish a statutory ground to terminate her parental rights. The constitutionality of the statute was upheld by this Court in *In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981). See also *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981). As detailed above, the evidence amply supports not one but several of the statutory grounds required to terminate parental rights. Through her own acts of neglect and inaction, respondent has never established a relationship with her children. The evidence overwhelmingly points to a total absence of family integrity since these children were born.

N.C.G.S. 7A-289.31(a) (Cum. Supp. 1979) provides:

Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

It is thus within the court's discretion to consider such factors as family integrity in making its decision of whether termination is in the best interests of the children. The children's best interests are paramount, not the rights of the parent. Sharon and Christopher have never known the security of a permanent home. The tragedy is theirs. Far from an abuse of discretion, the trial court's decision to terminate respondent's parental rights has afforded these children their only chance for a normal, happy family life.

[6] Petitioner raises a cross-assignment of error to the court's order providing a copy of the transcript to counsel without cost to respondent. The petition in the case was filed prior to the effective date of the amendment to N.C.G.S. 7A-451(a) which now entitles indigent parents to appointed counsel in termination proceedings. For that reason the federally funded Legal Services Corporation undertook to represent respondent, and it was that organization that made a determination of indigency in the first instance. The trial court's decision to permit respondent to proceed in forma pauperis was, moreover, based on a simple asser-

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tion of poverty, without inquiry as to her financial status. We agree that the costs of the transcript should be taxed to the North Central Legal Assistance Program.

We affirm the trial court's decision to terminate respondent's parental rights. The court's order respecting the costs of the transcript is vacated.

Affirmed in part; vacated in part.

Chief Judge MORRIS and Judge VAUGHN concur.

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REGINALD CLETUS CRAVEN, JR. v. TIMOTHY ALLEN CHAMBERS

No. 8121SC527

(Filed 2 March 1982)

**1. Damages § 3.4; Evidence § 48— psychiatrist—testimony concerning physical and psychological injuries received in automobile accident—exclusion improper**

In a personal injury action, the trial court erred in excluding testimony by plaintiff's psychiatrist of the physical, mental and emotional injuries suffered by plaintiff as a result of an automobile accident. In addition to the physical impact of the cars and a physical injury to plaintiff's eye, some of plaintiff's other injuries satisfied the requirement of physical injury and the testimony that plaintiff suffered from anxiety neurosis, extreme nervousness, fear, apprehension, excessive perspiration, dizziness, insomnia, irritability, and loss of appetite, as well as the psychiatrist's medical opinions, should have been admitted.

**2. Damages § 3.4— testimony of medical bills from psychiatrist—exclusion improper**

The trial court erred in not admitting into evidence plaintiff's medical bills from a psychiatrist since the medical attention given to plaintiff was reasonably necessary for the proper treatment of plaintiff's injuries.

**3. Evidence § 44— testimony concerning physical and mental health before and after accident—exclusion improper**

It was error for the trial court to exclude testimony by plaintiff and his father concerning plaintiff's physical and mental health before and after an automobile accident.

**4. Damages § 11.2.— punitive damages—improper in hit and run accident**

In an action concerning an automobile accident, evidence that a collision occurred on a two-lane paved road in a straight section between two curves; that neither vehicle was travelling at a speed exceeding 40 m.p.h.; that the

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defendant's car crossed the center line and "side-swiped" the rear of plaintiff's truck did not allow a reasonable inference of willful or wanton negligence on defendant's part, requiring the submission of an issue of punitive damages to the jury. Consequently, defendant's failure to remain at the scene following the collision was not, in and of itself, sufficient to warrant the submission of a punitive damages issue to the jury.

**5. Costs § 4.1—expert witness fees—necessity of subpoena**

It was error for the trial court to tax an expert witness fee as part of the costs when the expert had not testified pursuant to a subpoena.

APPEAL by plaintiff and defendant from *Lupton, Judge*. Judgment entered 16 December 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 January 1982.

Plaintiff alleges that as a result of an automobile collision with defendant's car, he suffered physical and emotional injuries, including a corneal abrasion in one eye, severe headaches, nervousness, insomnia, and anxiety neurosis. Following a jury verdict of \$400 for plaintiff, the trial court ordered defendant to pay, as part of the cost, plaintiff's attorney's fees and the expert witness fees. The defendant appealed and plaintiff cross-appealed.

*Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III for plaintiff appellant and plaintiff appellee.*

*Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughn and Keith A. Clinard for defendant appellant and defendant appellee.*

BECTON, Judge.

Defendant contends that the trial court erred in awarding attorney's fees and expert witness fees to plaintiff. On his cross-appeal, plaintiff contends that the trial court erred (1) in excluding testimony and medical bills from plaintiff's psychiatrist; (2) in not submitting an issue of punitive damages to the jury; and (3) in excluding testimony about plaintiff's physical and mental condition before and after the accident. Because defendant's issues can be summarily addressed, we discuss plaintiff's issues first.

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[1] Relying on *Williamson v. Bennett*, 251 N.C. 498, 112 S.E. 2d 48 (1960), the trial court excluded the testimony of Dr. Selwyn

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Rose, plaintiff's psychiatrist, concerning the physical and psychological injuries received by plaintiff in the automobile accident. The plaintiff contends the trial court erred in doing so, citing the more recent case of *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E. 2d 855 (1980), *disc. review denied* 301 N.C. 239, 283 S.E. 2d 136 (1980). We agree with plaintiff.

Historically, when there was no actual physical impact or physical injury, courts "displayed considerable reluctance to extend recovery for mental distress and nervous disorders resulting from shock and fright to situations involving ordinary negligence." 251 N.C. at 504, 112 S.E. 2d at 52. In explaining this reluctance, Professor Prosser says: "The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence. . . ." W. Prosser, *The Law of Torts*, § 54 at 329 (4th ed. 1971). Mental distress and nervous disorder cases have turned on their facts, however. When there is some indicia of trustworthiness, some guarantee that the claim is not spurious, courts have allowed recovery for mental and emotional disturbance. In *Williamson* our Supreme Court said: "It is almost the universal opinion that recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental stress, some actual physical impact or genuine physical injury also resulted directly from defendant's negligence." 251 N.C. at 503, 112 S.E. 2d at 52.

Although reversing the judgment awarding Williamson damages, the *Williamson* Court said: "[t]he case at bar is factually unique even in its own category—cases of fright, anxiety, and other emotional stress, unaccompanied by actual physical injury." 251 N.C. at 507, 112 S.E. 2d at 54. On the basis of the following facts, the *Williamson* Court was impelled to its conclusion that plaintiff failed to show that defendant's negligence was the cause which, "in natural and continuous sequence, unbroken by any new and independent cause," *id.*, produced the plaintiff's injury:

Plaintiff did not testify and does not now contend that she was frightened by the collision between her automobile and the defendant's sportscar. Neither does she assert that

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her anxiety was occasioned by the grinding sound along the left side of her car. . . . When the collision occurred she envisioned the possibility that she had collided with a non-existent child on an imaginary bicycle. In short, she was not frightened by what actually happened but by what might have happened. It was not the collision that caused her anxiety, it was something that did not exist at all, a phantom child on a non-existent bicycle.

*Id.*

Twenty years after *Williamson* this Court considered the application of *Williamson* to *Wesley v. Greyhound*, a case similar to the case *sub judice*. In *Wesley*, this Court stated:

Although the Court denied recovery in *Williamson*, it did so because the plaintiff's injury was thought not to have been the proximate result of the defendant's acts, not because of a disavowal of the universal rule. That that was the case is evidenced by reiteration of the rule in *King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967). It is significant that under the rule, a plaintiff may recover if there is "some actual physical impact or genuine physical injury." This alternative mode of proof justifying recovery is important because of the difficulty of defining "physical injury." See *Kimberly v. Howland*, 143 N.C. 398, 55 S.E. 778 (1906). Under whichever test used, we have no difficulty in finding that plaintiff has suffered a compensable injury.

47 N.C. App. at 690, 268 S.E. 2d at 862.

*Wesley* involved the claim of a Greyhound Bus Lines passenger who was sexually assaulted as she waited in the lounge of the ladies' rest room for her ride. In *Wesley*, this Court said:

Plaintiff presented evidence that since the sexual assault, she has had difficulty sleeping, has had nightmares, and has awakened at night afraid that some other person was in the room threatening to harm her. . . . When viewed properly, plaintiff's evidence indicates that she has suffered mental trauma or emotional disturbance.

*Id.*

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In the case *sub judice* the evidence indicates that there was physical impact and physical and mental injury suffered by plaintiff as a result of the negligent acts of the defendant. On *voir dire*, Dr. Rose testified that plaintiff suffered from anxiety neurosis, extreme nervousness, fear, apprehension, excessive perspiration, dizziness, insomnia, irritability, and loss of appetite.

Dr. Rose further testified:

It was my diagnosis that Mr. Craven had an anxiety neurosis, that is, he had a state of anxiety, nervousness or tension, which was disabling and which prevented him from functioning. . . . He also had obsessive feelings about death . . . . He had some memory deficit. He had a poor short-term recall. It didn't affect long-term memory, but when the level of anxiety goes up, ideas and thoughts that go into the person's head don't get lodged well or they are lost or they are not heard. He complained of nervous headaches. He had physical symptoms. He complained initially of heart pounding and feeling physically nervous, wired and agitated.

In response to an "opinion question" Dr. Rose stated: "It is my belief that the accident triggered the underlying anxiety neurosis that had been present but was under control at that time."<sup>1</sup> Additionally, in response to a subsequent hypothetical question, Dr. Rose testified that it was his opinion that the accident on 22 July 1979 in which the plaintiff was involved *caused* the plaintiff's anxiety neurosis.

In addition to the physical impact of the cars and the physical injury to plaintiff's eye, we believe some of plaintiff's other injuries satisfy the requirement of physical injury. Dr. Rose himself testified: "Anxiety Neurosis is in a sense a physical problem because anxiety, nervousness is mediated through the nerves and through systems of the body, endocrine system." And, according to Prosser, the temporary emotion of fright is "to be distinguished [from] shock to the nervous system, which commonly is regarded as injury to the body rather than to the mind, and

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1. Although the plaintiff had initially experienced anxiety neurosis after finding a dead man in the bathroom at Unique Furniture in March of 1979, he had gotten that condition under control, and had continued working. The automobile collision on July 22, 1979, caused the resurgence of the anxiety neurosis.

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hence satisfies the requirement of physical injury." W. Prosser, *Law of Torts*, § 54 at 329, n. 43 (4th ed. 1971).

As this Court recently stated in *Wesley*:

When under the test of physical injury, plaintiff has shown such a wrecking of her nervous system as to come within the rule so eloquently stated and explained in *Kimberly v. Howland*, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906):

"The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and when 'out of tune' cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

47 N.C. App. at 691, 268 S.E. 2d at 862-63. Professor Byrd's description of what constitutes a physical injury in North Carolina aptly summarizes our position:

Impairment of health, loss of bodily power, or sickness, without proof of any specific injury, has been held to constitute a physical injury. Similarly, proof that plaintiff became "almost helpless; that she could not go about her daily duties, and could not keep on her feet to attend to her children; that it has affected her ever since, and has caused her female trouble out of its regular course" has been held a sufficient showing of physical injury. A jury instruction permitting recovery if plaintiff was "put in fear and frightened to such an extent that she suffered physical pain, suffered in body and mind, and was made sick" was held proper. In many of these cases, expert medical testimony was not introduced to establish that the emotional distress could or did operate to cause physical consequences, and proof of the physical injury was through plaintiff's own testimony, much of which seems to have been couched in general language such as "sickness."

Byrd, *Recovery for Mental Anguish*, 58 N.C. L. Rev. 435, 458 (1980).



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Dr. Rose testified that the automobile collision was very traumatic and frightening for the plaintiff; that prior to the accident, the plaintiff was able to function and after the accident he was unable to do so; and that plaintiff was unable to continue his job at Unique Furniture after the accident, although he had worked there for a year and a half before the accident. It was error for the trial court to exclude the testimony of Dr. Rose at the conclusion of the *voir dire* hearing, thus preventing the jury from hearing testimony of the physical, mental and emotional injuries suffered by plaintiff as a result of the automobile accident of 22 July 1979.

## II

Having concluded that the trial court's decision barring Dr. Rose from testifying in the presence of the jury was contrary to the applicable law, it is not necessary to discuss in detail plaintiff's separate assignment of error relating specifically to the exclusion of Dr. Rose's medical opinions.

Having properly qualified Dr. Rose as an expert in the field of psychiatry, it was error for the trial court to sustain defendant's objections to plaintiff's cause and effect questions which sought Dr. Rose's medical opinions.

[2] We also elect to address summarily plaintiff's fifth, and closely related, assignment of error concerning the exclusion of his medical bills from evidence. We hold that the trial court erred in not admitting into evidence plaintiff's medical bills from Dr. Rose, since the medical attention given plaintiff was reasonably necessary for the proper treatment of plaintiff's injuries. See *Ward v. Wentz*, 20 N.C. App. 229, 201 S.E. 2d 194 (1973).

## III

[3] Plaintiff also argues that the trial court erred in excluding his testimony and the testimony of his father concerning plaintiff's physical and mental health before and after the accident. We agree with plaintiff. The state of a person's health, a person's ability to work or engage in activities, a person's physical appearance and sleeping habits, among other things, are proper subjects of opinion testimony by non-experts. Both the plaintiff and his father were able to describe the state of plaintiff's health after the accident and to compare it with that

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existing before the accident. The exclusion of their testimony was error. See *Ford v. Blythe Brothers Co.*, 242 N.C. 347, 357, 87 S.E. 2d 879, 885 (1955); *Wesley v. Greyhound Lines, Inc.*; *Kenney v. Kenney*, 15 N.C. App. 665, 669, 190 S.E. 2d 650, 653 (1972); 1 Stansbury, N.C. Evidence 2d, § 129 (Brandis Rev. 1973).

## IV

[4] Plaintiff next assigns as error the trial court's failure to submit the issue of punitive damages to the jury. Plaintiff contends that defendant's failure to stop and render assistance after being involved in an accident, in conjunction with other circumstances, warranted the submission of the issue of punitive damages to the jury. We disagree.

Although our courts have long held that punitive damages are recoverable in an automobile collision on allegations and proof that the injury complained of resulted from wanton negligence, *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 396-97 (1956) we have found no North Carolina case concerning the award of punitive damages in a hit and run situation. Indeed, only a few jurisdictions have considered this matter. Annot. 156 A.L.R. 1115 (1945).

In *Pelican Trucking Co. v. Rossetti*, 251 Miss. 37, 167 So. 2d 924 (1964), the Mississippi Supreme Court held that the trial court erred in submitting an issue of punitive damages when the only evidence relating to that issue was the failure of the defendant-driver to stop after defendant's truck had collided with plaintiff's car, and stated:

There are very few cases on this question. The rule seems to be that failure to stop after the accident is not of itself evidence sufficient to support punitive damages, but along with all the accompanying facts and circumstances of the accident may be used to show that that portion of defendant's conduct which constituted the proximate cause of the accident was willful and wanton or grossly negligent [citations omitted]. . . .

The question is: To what extent is failure to stop after an accident acceptable evidence to support exemplary damages? The inquiry must originate with the quality of the act causing the damages. Where there are other circumstances im-

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mediately prior to and at the time of the collision which would tend to show gross negligence supporting exemplary damages in the act causing the damages, the actor's conduct occurring immediately after the happening of the accident may be relevant.

251 Miss. at 42-43, 167 So. 2d at 926.

In the case *sub judice* it is of no concern that the Complaint alleged wanton conduct or gross negligence. The issue before us is whether plaintiff's *proof* was sufficient to warrant submission of the punitive damages issue to the jury. We think not. Moreover, "we are not disposed to expand [the bases for the recovery of punitive damages] beyond the limits established by authoritative decisions of [our appellate courts]." 244 N.C. at 27, 92 S.E. 2d at 396.

We are clearly bound by this Court's holding in *Jarvis v. Saunders*, 34 N.C. App. 283, 237 S.E. 2d 865 (1977). In *Jarvis*, we set out the evidence in the opinion as follows:

The collision which gave rise to the suit herein occurred on the afternoon of 15 November 1973. Plaintiff was riding his motorcycle on the back stretch of the larger track proceeding at a speed of 35 to 40 m.p.h. in a clockwise direction. Defendant, who had been riding in a clockwise direction stopped, turned around, and resumed travelling in the opposite direction accelerating to a speed of 35 to 40 m.p.h. When plaintiff observed the defendant headed toward him, he drove his motorcycle onto the grass shoulder on the right side of the trail, maintaining his speed. Though the trail was narrow there was sufficient room for the two motorcycles to clear each other. However, when they were within approximately 3 to 5 yards of each other, plaintiff saw defendant looking directly at him and "saw Greg's arm turn and he turned right toward me." The front wheel of defendant's motorcycle then collided with the front fender of plaintiff's motorcycle at a 45 degree angle causing serious injuries to plaintiff.

34 N.C. App. at 285, 237 S.E. 2d at 866. After discussing the requirements of willful, wanton or gross negligence, this Court stated:

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While the evidence here is sufficient to support the jury's finding of negligence on the part of the minor defendant and contributory negligence on the part of the plaintiff, we are of the opinion that it is not sufficient to raise an inference of willful, wanton or intentional conduct, or gross negligence on the part of the minor defendant.

34 N.C. App. at 286, 237 S.E. 2d at 867. *See also Roberts v. Davis*, 15 N.C. App. 284, 189 S.E. 2d 767 (1972). Our Supreme Court seems to have tipped its hand, too. In *Heath v. Kirkman*, 240 N.C. 303, 82 S.E. 2d 104 (1954), in which the injured plaintiff sought punitive damages because the allegedly negligent defendant-driver refused to obtain medical treatment for the plaintiff following the accident, the Supreme Court commented on the plaintiff's punitive damage claim *in dicta*:

The appeal does not present the question as to the sufficiency of the allegations to warrant submission of an issue of punitive damages. Suffice it to say, decision of this question depends upon the circumstances giving rise to the alleged cause of action and not upon what occurred subsequent to the infliction of the personal injury.

*Id.* at 310, 82 S.E. 2d at 109.

In the case *sub judice*, there is evidence that the collision occurred on a two-lane paved road in a straight section between two curves; that neither vehicle was travelling at a speed exceeding 40 m.p.h.; and that defendant's car crossed the center line and "side-swiped" the rear of plaintiff's truck. Considering this and all the evidence, we are convinced that, although the evidence could support the jury's verdict that defendant was negligent, it does not allow a reasonable inference of willful or wanton negligence on defendant's part, requiring the submission of an issue of punitive damages to the jury. Consequently, defendant's failure to remain at the scene following the collision is not, in and of itself, sufficient to warrant the submission of a punitive damages issue to the jury.

In summary, although rejecting plaintiff's argument that the punitive damages issue should have been submitted to the jury, we hold that the trial court erred (1) in excluding testimony and medical bills from plaintiff's psychiatrist, and (2) in excluding

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testimony about plaintiff's physical and mental condition before and after the accident.

**DEFENDANT'S APPEAL**

Defendant first argues that the trial court should not have awarded plaintiff attorney's fees under G.S. 6-21.1 since that statute was intended to encourage plaintiffs with small claims to bring their actions despite the high cost of counsel. According to defendant, plaintiff did not regard his claim as small; the initial claim was for \$51,000.00, and the last offer of settlement was for \$14,999.00.

To defendant's first argument, plaintiff makes three responses: (1) G.S. 6-21.1 makes specific reference to the amount recovered,<sup>2</sup> not the amount prayed for in the complaint; (2) the size of plaintiff's claim was reduced drastically when the trial court refused to admit testimony concerning plaintiff's psychological damages; and (3) the trial court did not abuse its discretion.

It is not necessary to address the specific arguments and counterarguments on this issue. Under G.S. 6-21.1, attorney's fees are "taxed as a part of the court costs." Because we are awarding plaintiff a new trial, no "judgment for damages" has been obtained, and, consequently, no attorney's fees shall be awarded as part of the cost.

[5] Defendant next argues that "the trial court erred in taxing an expert witness fee [of \$200] for Dr. David Branch against the defendant in that Dr. Branch's testimony was not pursuant to a subpoena." Simply put, it is error for a trial court to tax an expert witness fee as part of the costs when the expert has not testified pursuant to a subpoena. *State v. Johnson*, 282 N.C. 1,

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2. G.S. 6-21.1 states: In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is five thousand dollars (\$5,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

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26-28, 191 S.E. 2d 641, 659 (1972); *Groves and Sons v. State*, 50 N.C. App. 1, 69, 273 S.E. 2d 465, 501 (1980), *disc. rev. denied* 302 N.C. 396, 279 S.E. 2d 353 (1981). A more elaborate statement is contained in *Siedlecki v. Powell*, 36 N.C. App. 690, 698, 245 S.E. 2d 417, 422 (1978), in which this Court stated:

In their final argument, defendants assign error to the trial court's order setting an expert witness fee for plaintiff's witness, Dr. Keller, to be taxed as part of the costs in the action. This assignment of error has merit.

G.S. 7A-314(a) and (d) allow the court to set an expert witness fee. As interpreted by our Supreme Court in *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972), the statute requires that a witness must be under subpoena before he or she is entitled to compensation. Under this interpretation, the trial court had no authority to order the fee on behalf of Dr. Keller, who admittedly did not testify in obedience to a subpoena. Plaintiff's argument that the provisions of G.S. 7A-314(a), allowing fees for a witness "under subpoena, bound over, or recognized" should be read in the alternative, is persuasive; however, we are bound by the decision of the Supreme Court. We hold, therefore, that the order allowing the expert witness fee must be reversed.

In summary, neither the attorney fees nor the expert witness fee should have been awarded as part of the cost in this action.

On defendant's appeal, we

Vacate the award of attorney's fees and expert witness fees.

On plaintiff's cross appeal, we

Reverse and remand for a new trial.

Judge HEDRICK and Judge MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. REGINAL CORNELIUS BERKLEY

No. 8113SC737

(Filed 2 March 1982)

**1. Criminal Law § 172— error cured by verdict**

Any error with respect to the greater crimes charged was rendered harmless by the conviction of defendant of lesser included offenses absent some showing that the verdicts of guilty as to the lesser crimes were affected thereby.

**2. Robbery § 4.2— common law robbery—sufficiency of evidence**

The evidence was sufficient to permit the jury to infer that defendant parted with \$25 because of fear for his life and safety and to support the conviction of defendant for common law robbery.

**3. Crime Against Nature § 3— second-degree sexual offense—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of second-degree sexual offense where the victim testified that defendant kidnapped and threatened to kill him, that a knife and shotgun were in defendant's car, that he ran away at one point but the defendant caught him, and that he permitted defendant to perform oral sex on him because of fear for his life.

**4. Crime Against Nature § 2— indictment for first-degree sexual offense**

An indictment was sufficient under G.S. 15-144.2(a) to charge first-degree sexual offense although it failed to allege any of the particular elements that distinguish first-degree and second-degree sexual offense.

**5. Crime Against Nature § 1; Rape and Allied Offenses § 2— second-degree sexual offense—sufficiency of force**

The threat of serious bodily harm which reasonably induces fear thereof constitutes sufficient force for a second-degree sexual offense under G.S. 14-27.5(a)(1), and the trial court did not err in instructing that the threat of force, as well as force itself, would be sufficient to satisfy the "by force" element of second-degree sexual offense.

**6. Crime Against Nature § 4— second-degree sexual offense—misstatement of law—harmless error**

Although the trial court in a prosecution for second-degree sexual offense may have misstated the law by referring to threats "to perform any other forceable act" upon the victim, such error was harmless where the evidence tended to show that if the sexual act was committed in response to any threat, it was in response to defendant's threats, accompanied by the display of certain deadly weapons, to kill or maim the victim, and there was no evidence of other types of threats.

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**7. Crime Against Nature § 4— sexual offenses—submission of crime against nature as lesser included offense—error cured by verdict**

Any error in the trial court's submission of crime against nature as a lesser included offense of first and second-degree sexual offense was not prejudicial to defendant where the jury convicted defendant of second-degree sexual offense.

**8. Criminal Law § 126— instruction on unanimity of verdict**

The trial court's instruction that the jury's verdict "must be unanimous, that is agreed to by all twelve of you" was sufficient without a further instruction that no juror need submit to the will of the others.

**9. Criminal Law § 126.3— impeachment of verdict by juror—denial of funds to depose juror**

The trial court did not err in the denial of defendant's motion for appropriate relief on the ground that one juror had informed defense counsel that she had understood the jury instructions to require her to conform her vote to that of the majority and defendant's motion for funds to employ a reporter for the purpose of deposing such juror since evidence will not be received from jurors for the purpose of impeaching their verdict after the verdict has been received by the court and the jurors have been discharged.

APPEAL by defendant from *Tillery, Judge*. Judgments entered 11 March 1981 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 5 January 1982.

Defendant was indicted for kidnapping, sexual offense, and armed robbery. According to the testimony of the victim, Robert Simms Memory, defendant stopped Memory at about 8:30 p.m. on 27 December 1980 by flashing his car lights at him. Defendant said he wanted to talk, and Memory let defendant get in his car. Defendant then stated that he was kidnapping Memory and threatened to kill him. Defendant told Memory he had a gun in the back of his pants. The two got into defendant's car. There was a knife on the dashboard and a shotgun in the back seat. Defendant stopped for gas and told Memory that he would kill him if he made a move. Defendant then drove to a field and parked there for about 2½ hours. At one point Memory ran away, but defendant caught him and took him back to the car. Defendant performed fellatio upon Memory. Memory refused to do the same to defendant, but he told defendant he would meet him the next day; and he gave defendant his father's name, address, and telephone number. Defendant took \$25 from Memory's wallet "for insurance that [Memory] would show up the next day," and he drove Memory back to his car. Memory told his parents what had hap-



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pened, and they contacted the police. Defendant called to arrange a meeting the next day, and the police apprehended him.

Defendant testified that Memory stopped him by flashing his car lights, and that Memory stated that he was having problems and wanted to talk. Memory "said that he was looking for some guy that was a homosexual" and defendant suggested that they ride around for awhile. They got in defendant's car, and defendant drove while Memory talked about sex. Defendant pulled off the road "to use the bathroom," and Memory ran away. Defendant caught up with him, and Memory said that he had run "to see if [defendant] really cared enough about him to run him down." They returned to the car, and Memory suggested that they have oral sex. Defendant performed fellatio on Memory with Memory's permission. Memory started to do the same to defendant, but he stopped and said "we would wait until tomorrow." Defendant returned Memory to his car and asked to borrow some money. Memory gave him \$25 and his name, address, and telephone number. Defendant testified that Memory did not seem agitated or frightened when they parted.

The jury acquitted of kidnapping but convicted of second-degree sexual offense and common law robbery. From a judgment of imprisonment, defendant appeals.

*Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.*

*T. Craig Wright for defendant appellant.*

WHICHARD, Judge.

By his first and second assignments of error, defendant argues the court erred in refusing to dismiss all charges at the close of the State's evidence and the close of all the evidence. Only the ruling made at the close of all evidence is subject to review. *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980).

[1] As to armed robbery and first-degree sexual offense, defendant was acquitted of these crimes. He was convicted of the lesser crimes of common law robbery and second-degree sexual offense; and these convictions render harmless any error with respect to the greater crimes, absent some showing that the verdicts of guilty as to the lesser crimes were affected thereby. *State v. Casper*,

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256 N.C. 99, 122 S.E. 2d 805 (1961), *cert. denied*, 376 U.S. 927, 11 L.Ed. 2d 622, 84 S.Ct. 691 (1964); *State v. DeMai*, 227 N.C. 657, 44 S.E. 2d 218 (1947); *State v. Wynn*, 25 N.C. App. 625, 214 S.E. 2d 274, *cert. denied*, 288 N.C. 252, 217 S.E. 2d 677 (1975); *State v. Sallie*, 13 N.C. App. 499, 186 S.E. 2d 667, *cert. denied*, 281 N.C. 316, 188 S.E. 2d 900 (1972); *State v. Keyes*, 8 N.C. App. 677, 175 S.E. 2d 357, *cert. denied*, 277 N.C. 116 (1970). No such showing has been made.

[2] As to common law robbery, defendant contends the evidence is insufficient because it failed to establish that he subjected Memory to threats of harm if Memory did not part with his money. He relies on his testimony and Memory's testimony that defendant said he took the money "for insurance that [Memory] would show up the next day" to prove that (1) he did not threaten or intend to harm Memory if Memory refused to part with the money, and (2) Memory did not part with the money as a result of his threats or from fear of harm.

Memory's testimony, however, indicated that he feared for his life and safety throughout the incident with defendant. Memory testified that defendant left him with two dollars, but that "he could have had it if he had wanted to." The entirety of Memory's testimony clearly permitted the inference that he parted with the \$25 because of fear for his life and safety. "Intent must . . . be determined from all the facts and circumstances. Absent direct evidence, specific intent is 'ordinarily to be proved by facts and circumstances from which it may be inferred and . . . the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time . . .'" *State v. Whitaker*, 55 N.C. App. 666, 286 S.E. 2d 640, 641-42 (1982). The acts and conduct of defendant, considered in light of the general circumstances existing at the time, permitted the jury to infer that defendant took money from Memory "against his will, by . . . putting him in fear." *State v. Moore*, 279 N.C. 455, 457, 183 S.E. 2d 546, 547 (1971). The evidence thus was sufficient to sustain the conviction for common law robbery.

[3] As to second-degree sexual offense, the evidence is sufficient to sustain the conviction. Defendant argues there is no evidence as to the use of force, a necessary element of the offense; but the evidence refutes his contention. Memory testified that defendant

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kidnapped and threatened to kill him, that a knife and a shotgun were in defendant's car, and that he ran away at one point but the defendant caught him. Memory further testified:

And he took me back to the car. He had hold of both my arms, and walked me back to the car. I was still scared. We got in the car, and I looked at him, and he looked at me. I told him that if he wouldn't kill me that I would do anything he wanted me to do. He started kissing me and I scrunched away. And then he kept on. After I had just went ahead and let him do what he wanted to. . . .

. . . .

I never consented to the oral sex where I told him to go ahead and do what he had to do, to let me live. I did not want him to perform the act on me. The gun and knife were in the same position at all times.

This evidence, in the light most favorable to the State, is sufficient to show that the sexual act was committed by force and against Memory's will. *See State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826 (1965); *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946). Defendant's first two assignments of error are overruled.

[4] In his third assignment of error, defendant argues that the sexual offense indictment charged only second-degree sexual offense and the trial court therefore erred in instructing as to first-degree sexual offense and submitting this as a possible verdict. The indictment fails to allege any of the particular elements that distinguish first-degree and second-degree sexual offense. *See* G.S. 14-27.4 and .5. G.S. 15-144.2(a) (Cum. Supp. 1981), however, authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of these elements. *See generally State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978) (upholding the constitutionality of G.S. 15-144.1, which authorizes an abbreviated form of indictment for rape). The indictment here sufficiently complied with G.S. 15-144.2.

The error assigned relates to the greater crime of first-degree sexual offense; and the jury acquitted defendant of that crime, convicting of the lesser crime of second-degree sexual offense. Any error with respect to submitting the question of defendant's guilt of the more serious crime is thus harmless. *State*

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*v. Casper, supra; State v. DeMai, supra; State v. Wynn, supra; State v. Sallie, supra; State v. Keyes, supra.* Defendant has not shown that his conviction was affected by consideration of his possible guilt of the more serious crime.

[5] Defendant's fourth assignment of error relates to the court's explanation of the element "by force" in the instructions on first-degree sexual offense. Although defendant was acquitted of first-degree sexual offense, this alleged error cannot be summarily disregarded as harmless, because the court referred to its instructions on first-degree sexual offense in defining second-degree sexual offense, the crime of which defendant was convicted.

Specifically, defendant argues the court erred by impliedly instructing that the threat of force, as well as force itself, would be sufficient to satisfy this element. Engaging in a sexual act with another person "by force and against the will of the other person" constitutes second-degree sexual offense. G.S. 14-27.5(a)(1). The element "by force" has long been a part of the law of rape in this State. We thus look to the interpretation of this element in rape cases for guidance. In *State v. Roberts*, 293 N.C. 1, 13, 235 S.E. 2d 203, 211 (1977), we find the following:

The force necessary to meet the latter requirement, as explained on numerous occasions by this Court, need not be physical force but may take the form of fear, fright or coercion. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). The mere threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force. *State v. Burns*, 287 N.C. 102, 214 S.E. 2d 56 (1975); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974).

Accord, *State v. Burns*, 287 N.C. 102, 214 S.E. 2d 56, cert. denied, 423 U.S. 933, 96 S.Ct. 288, 46 L.Ed. 2d 264 (1975), and cases cited. We hold that the threat of serious bodily harm which reasonably induces fear thereof likewise constitutes sufficient force for a second-degree sexual offense under G.S. 14-27.5(a)(1). The instruction challenged is thus without error.

[6] After explaining the elements of first-degree sexual offense and giving a mandate thereon, the court instructed the jury as follows:

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Now, if you do not find him guilty of first-degree sexual offense, you must consider whether he is guilty of a second-degree sexual offense.

And second-degree sexual offense differs from first-degree in that it is not necessary for the State to prove beyond a reasonable doubt that the defendant employed or displayed a dangerous or deadly weapon or an article which Simms Memory reasonably believed was a dangerous or deadly weapon.

So, I charge you that if you reach that possible choice of verdicts, and if you find, beyond a reasonable doubt, that . . . Reginal Berkley engaged in fellatio with Simms Memory; and that he did so by threatening his life, or by otherwise threatening to maim him, or to perform any other forcible act upon him, and that this was sufficient to overcome any resistance which Simms Memory might have made; and that Simms Memory did not consent, and that it was against [his] will, it would be your duty to return a verdict of second-degree sexual offense.

If you do not so find or have a reasonable doubt, give him the benefit of that doubt and do not find him guilty of that charge.

Defendant's fifth and sixth assignments of error relate to these instructions. Defendant argues the explanation of second-degree sexual offense is inadequate and confusing and that the court misstated the element of force in the mandate as to second-degree sexual offense. We reject these arguments. The court carefully enumerated the elements of first-degree sexual offense and then explained that second-degree sexual offense differs in the omission of one designated element. In this, we find no error.

It is a well-recognized rule of law that the trial judge's charge must be construed contextually as a whole, and when, so construed, it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained. 7 N.C. Index 2d, Trial § 33.

*State v. Henderson*, 285 N.C. 1, 19, 203 S.E. 2d 10, 22 (1974), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3202

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(1976). We find no reasonable cause to believe the jury was misled or misinformed as to the elements of second-degree sexual offense, and we find no prejudicial error in the mandate as to that offense. The court may have misstated the law by referring to threats "to perform any other forcible act upon [Memory]." A threat of "any" forcible act will not necessarily suffice. *See generally* 75 C.J.S., Rape § 15 (1952). We nevertheless find no prejudicial error in light of the evidence in this case, which tends to show that if the sexual act was committed in response to any threat, it was in response to defendant's threats, accompanied by the display of certain deadly weapons, to kill or maim Memory. We have held, *supra*, that threats of serious bodily harm which reasonably induce fear thereof constitute sufficient force for second-degree sexual offense. We conclude that, since there was no evidence of other types of threats, the reference to other types of threats could not have been prejudicial. *Cf. State v. Johnson*, 28 N.C. App. 166, 220 S.E. 2d 632 (1975), *disc. review denied*, 289 N.C. 453, 223 S.E. 2d 162 (1976). These assignments of error are overruled.

[7] The court submitted crime against nature as a lesser included offense of first and second-degree sexual offense. By his seventh and eighth assignments of error, defendant argues that crime against nature is not included within the allegations of the sexual offense indictment, and that the trial court erred in instructing on and submitting it as a possible verdict. We note that G.S. 15-144.2(a), the statute authorizing the abbreviated form of sexual offense indictment, provides that such an indictment "will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault."

*State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975), was a case of homicide in which the defendant was convicted of second-degree murder. The Supreme Court stated:

Finally, we agree with defendant's contention that the evidence did not require the submission of the lesser included offense of voluntary manslaughter; however, its submission to the jury was prejudicial to the State, not to defendant. *State v. Accor and State v. Moore*, 281 N.C. 287, 188 S.E. 2d 332; *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525; *State v.*

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*Chase*, 231 N.C. 589, 58 S.E. 2d 364. Even had there been prejudice in the submission of voluntary manslaughter to the jury, such prejudice was cured by the fact that the jury never reached the consideration of this lesser included offense.

*Id.* at 101, 214 S.E. 2d at 36. We conclude that any error here in submitting crime against nature as a lesser included offense was harmless.

Defendant's ninth, tenth, eleventh and twelfth assignments of error each deal with various instructions as to either armed robbery or common law robbery. As indicated above, any error as to armed robbery was harmless, because the jury acquitted defendant thereof. We have examined the instructions as to common law robbery, and we find no prejudicial error.

[8] Defendant's thirteenth assignment of error relates to the following instruction: "Your verdict in each of these cases, whatever it is, must be unanimous, that is agreed to by all twelve of you." Defendant argues the instruction was insufficient, and that the court should have instructed that no juror need submit to the will of the others. Our Supreme Court rejected a similar argument in *State v. Ward*, 301 N.C. 469, 272 S.E. 2d 84 (1980). The court wrote:

Defendant's next argument relates to the following charge to the jurors:

Now, the court instructs you that a verdict is not a verdict unless and until all twelve jurors agree unanimously as to what your decision shall be; that is, all twelve minds agree on a verdict of guilty or not guilty.

Defendant argues that the court should have also instructed that individual jurors were not to surrender their own convictions solely in order to reach a verdict. We note, however, that defendant requested no instructions to this effect, and we are therefore not readily disposed to hear his complaint now. See *State v. Poole*, 25 N.C. App. 715, 214 S.E. 2d 774 (1975). Furthermore, the instruction as given is in accordance with the law of this State as set out in G.S. 15A-1235 as follows: "Before the jury retires for deliberation, the judge *must* give an instruction which informs the jury that in order

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to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty." [Emphasis added.] We find no error.

*Id.* at 478-479, 272 S.E. 2d at 90. This assignment of error is overruled.

[9] Defendant's last two assignments of error relate to his post-trial motions. Sometime after the verdict was returned, defense counsel moved for appropriate relief on grounds that one of the jurors had contacted him the night before and informed him she had understood the jury instructions to require her to conform her vote to that of the majority. The motion was denied. Defense counsel then moved for funds with which to employ a reporter for the purpose of deposing this juror "for any future purposes for which [the deposition] might be used . . . ." This motion also was denied. "It is well settled in North Carolina that after a verdict has been rendered and received by the court, and jurors have been discharged, jurors will not be allowed to attack or overthrow their verdict, nor will evidence from them be received for such purpose." *State v. Cherry*, 298 N.C. 86, 100, 257 S.E. 2d 551, 560 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980); *accord*, *State v. Hollingsworth*, 263 N.C. 158, 139 S.E. 2d 235 (1964). We thus find no error in the trial court's rulings.

No error.

Judges CLARK and BECTON concur.

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STATE OF NORTH CAROLINA v. EDDIE HUDSON

No. 8126SC930

(Filed 2 March 1982)

**1. Homicide § 21.9— voluntary manslaughter—sufficiency of evidence**

In an action in which defendant was charged with the murder of his former wife, the evidence was sufficient to survive defendant's motion to dismiss and to require submission of the charge of voluntary manslaughter to the jury where the evidence tended to show that the victim was last seen alive by her grandchildren arguing with defendant some time after 1:00 a.m.; that she was found dead by them around 11:00 a.m. the same day; that the victim died from a stab wound to the chest and the knife blade was found in the



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wound; that two paper towels were found in a trash can on top of a handle which matched the knife blade found in the victim's body; that laboratory analysis showed that the blood spot had an enzyme component matching defendant's blood; that the children had neither heard nor seen anyone enter the house during the night; that there were no signs of forcible entry; and that defendant's room, when he was arrested, bore blood spots that matched defendant's A-B-O grouping.

**2. Constitutional Law § 30— test on blood stained towels—admissibility of**

In a homicide case, admission of testimony regarding tests done on blood stained towels was proper since defendant was aware of the existence of the paper towels and of the lab results showing that the blood thereon could have been defendant's and could not have been the victim's. Had defendant made a timely motion concerning the towels, he could have had an independent analysis of the blood spots on the towels; however, a period of more than six months elapsed from the date of seizure to the date of defendant's motion seeking exclusion of evidence regarding tests done on the paper towels, and more than six months had elapsed since the towels had been destroyed.

**3. Criminal Law § 89.2— testimony concerning TV movie at time of crime—admission not prejudicial error**

In a homicide case in which one of the victim's grandchildren stated she had seen defendant and the victim arguing at a time when a western movie was on TV, it was not prejudicial error to allow an officer to testify that he "set up an appointment with Channel 18 to view a western movie" that was shown after the time defendant had stated he had left the victim's home.

**4. Criminal Law § 75.3— statements by defendant—admissibility**

Where all the evidence presented at a *voir dire* hearing on a motion to suppress statements made by defendant to an officer indicated that the statements were made freely and voluntarily and with the full understanding of defendant's rights, the trial court properly admitted the statements.

APPEAL by defendant from *Allen, Judge*. Judgment entered 29 January 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 February 1982.

Defendant was tried on a bill of indictment charging him with the murder of Daisey Inez Harris. The jury returned a verdict of voluntary manslaughter and defendant was sentenced to twenty years imprisonment.

*Attorney General Edmisten by Assistant Attorney General Lisa Shepherd, for the State.*

*Assistant Appellate Defender Marc D. Towler, for the defendant.*

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MARTIN (Robert M.), Judge.

Defendant argues four assignments of error on appeal. We have considered each assignment and conclude that the trial court committed no error which would entitle defendant to a new trial.

[1] The defendant's major challenge is to the sufficiency of the evidence to survive the motion to dismiss.

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980).

The evidence presented by the State must be sufficient to convince a rational trier of fact to find each element of the crime beyond a reasonable doubt. *State v. Riddle*, 301 N.C. 153, 270 S.E. 2d 476 (1980); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979).

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. (Citations omitted.)

The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. [Citations omitted.] The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence. (Citations omitted.)

The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. [Citation omitted.] "When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable

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inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, supra. [Citations omitted.] In passing on the motion, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially true when the evidence is circumstantial since one bit of such evidence will rarely point to a defendant's guilt.

*State v. Powell*, supra at 99, 261 S.E. 2d 117-18.

State's evidence disclosed that Daisey Harris was last seen alive by her grandchildren sometime after 1:00 a.m. on 30 December and that she was found dead by them around 11:00 a.m. the same day. Her body was found in the hallway of her house which adjoined the living room. She was lying in a pool of blood, and there was blood on the walls. Blood-like spots also were found on the piano and piano stool in the living room. The victim had died from a stab wound to the chest and the knife blade was found in the wound. The medical examiner testified that she might have been alive as late as 8:00 a.m., but that it was not probable.

In the kitchen, one paper towel was found on a table and two were found in a trash can on top of a handle which matched the knife blade found in the victim's body. The paper towels were spotted with blood. Laboratory analysis showed that the blood spots had an enzyme component matching defendant's blood, and not matching the victim's.

Defendant previously had been married to the victim, but they were divorced, and were seeing each other again at the time she was killed. On the night of the killing, defendant went to the victim's house, and around midnight he indicated that he intended to stay there. At that time he and the victim were alone in the house. He was seen at the victim's house between 1:15 and 1:30 a.m. when her grandchildren were left there. Sometime between 1:00 and 2:30 a.m. defendant was seen by a grandchild arguing with the victim in front of the piano in the living room. This was the last time the victim was seen alive. The next morning the grandchildren were alone in the house with the victim's body. Neither child had heard or seen anyone enter during the night

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and there were no signs of forcible entry. Officers conducting the investigation of the crime found no evidence of broken windows or forcible entry at the Harris residence.

Items found in defendant's room when he was arrested bore blood spots that matched defendant's A-B-O type. Defendant had a cut on each hand, one on the middle finger of his right hand and one on his left thumb. The police asked defendant when he had gotten home and what time he had left the residence of Daisey Inez Harris. "One time he mentioned 11:00. He finally settled with the time of 12:00 and that he had gotten home at 12:30 at the latest." Considering this evidence in the light most favorable to the State, there was substantial evidence that the defendant committed the crime charged, requiring submission of the case to the jury.

[2] The defendant's next contention is that the court erred in denying his motion to dismiss or in the alternative to exclude evidence regarding tests done on certain paper towels. In ruling on the motion, the trial court found as fact:

6. That during a Crime Scene Search, four paper towels were removed from the scene containing human blood and that this blood was analyzed and determined on analysis, to contain a similar enzyme typing as found in defendant's blood following a separate analysis, an enzyme type different from that found in the victim's blood following analysis; that this finding was known to defendant no later than April, 1980 and that on each occasion that the case was called for trial from February through March, April and May the defendant moved for the continuance of his case, which was granted. The basis for the request for continuance being that the defendant be given additional time to prepare for trial of the case;

7. That the paper towels were retained in the Property Control Center of the Charlotte Police Department from December through June, with exception of the time that they had been removed by various authorized personnel for observation and analysis; that it is standard procedure in Property Control for an Investigating Officer or an Officer in control of the case to receive, after a period of ninety days, a Disposition Sheet requesting a determination as to whether the

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evidence should be retained further or might be destroyed; that such a sheet was forwarded to Officer Howey, who mistakenly thought that the case had been disposed of and authorized destruction of the paper towels; that the paper towels were destroyed on June 10th, 1980 in accordance with Officer Howey's authorization;

8. That upon learning that the case had not been disposed of and before he knew that the towels had been destroyed, Officer Howey went to the Property Control Room in an effort to preserve the towels as evidence, but learned that the destruction had already occurred;

9. That in June, 1980, after the towels had been destroyed, the defendant moved to be permitted to have an independent analysis done of the blood appearing on the paper towels; that no such motion was filed from January until the latter part of June and that no request had been made by the defendant that the evidence be secured or retained and that up to this time, all Motions for Continuance in the case have resulted from defendant's requests and same was granted to provide ample time and additional time to defendant to prepare his case; that specifically, on May 14, 1980, the defendant was advised, through his counsel, during discussions concerning a possible plea in the case, that the analysis had indicated presence of blood similar to that of the defendant's, but at that time, motion [sic] was lodged concerning the towels; that the motion concerning the blood analysis was filed on June 16, 1980 and that the full discovery compliance occurred on February 15, 1980.

10. That the destruction of the towels was purely inadvertent; that no one, including the defendant, suggests that there was any bad faith involved on the part of the officers or the Property Control Unit, and at this date no one has any way of knowing precisely what an independent analysis would have shown;

11. That the blood analysis that was made of the defendant's blood confirms the accuracy of analysis to this time;

12. That defendant will have full opportunity to cross examine the expert witness, if called, by the State to challenge

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the admissibility of the evidence on other grounds, and his rights will be fully protected in regards to confrontation;

13. That had the defendant chosen to make a timely Motion concerning the towels, there is no reason to believe or suggestion that they could not and would not have been retained; that the Motion was not timely in that a period of more than six months has lapsed from date of seizure to date of the filing of the motion, as well as a lapse of more than six months from date of seizure to the time of destruction;

14. That neither Officer Howey or Officer Guerette nor Mr. Fasnacht had any intention to deprive the defendant of the evidence and all parties concerned acted in good faith concerning the evidence involved in the subject of this Motion.

Defendant relies upon cases decided by the United States Supreme Court in arguing that the court erred in denying his motion. He cites *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963) and *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976) as authority for his position. We find neither *Brady* nor *Agurs* applies to the case *sub judice* because this is not a case of undisclosed evidence. The defense was aware of the existence of the paper towels, of the lab results showing that the blood thereon could have been defendant's and could not have been the victim's. Had the defendant acted in a timely fashion, he could have had the independent analysis of the blood spots. No error has been shown in the trial judge's findings of fact, and the conclusion of law he reached is supported by these findings. We find no constitutional rights of defendant have been violated.

[3] The State presented evidence through the investigating police officer that a western movie was being shown on channel 18 between 1:00 and 2:30 a.m. the night the deceased was killed. LaShawn Harris testified that she and her brother went to her grandmother's house that night after midnight. After she got there, she and her brother started watching a western movie on T.V. "Sometime" while they were watching T.V. she left the room to go to the bathroom, and at that time the deceased and the defendant were arguing. She went on from the bathroom to bed and did not see her grandmother anymore. Defendant argues

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that the testimony regarding the movie the grandchildren were watching was inadmissible hearsay. He argues that the name of the movie and the time that it was shown "were obviously not firsthand knowledge on the part of Officer Guerette."

Officer Guerette testified that he "set up an appointment with Channel 18 to view a western movie that was—that La-Shawn and O.J. were observing the night that this occurred," and that "[t]he name of the movie was 'The Last Command'; it had been shown between 1 o'clock and 2:30, on the night of the 30th of December, 1979." There is no indication in the record that Officer Guerette did not know these facts from firsthand observation. Conceding *arguendo* that the challenged evidence was hearsay and therefore inadmissible, defendant has failed to show its admission was reversible error. Teresa Harris testified that she took her children to spend the night with the deceased on the night of the killing, and that the defendant opened the door to let the children in the house, "[t]hat was between 1:15 and 1:30." Thus, there was another unchallenged evidence which tended to place defendant at the victim's home after 10:30, the time he had told police he left there, and nearer to the time she was killed. At most, the challenged evidence was cumulative, supporting the other evidence that defendant was at the scene at the time of the killing and not a major element of proof. No prejudicial error was committed in admission of the challenged testimony.

[4] Officer Guerette arrested the defendant at his motel room the day after the murder and read him his Miranda rights. He asked the defendant, "Do you understand each and every one of these rights?" The defendant indicated that he did. Guerette also asked him, "Do you understand that when you start talking to me, you can stop talking with me at any time?" Defendant indicated "yes." Guerette then asked the defendant two questions, the responses to which the defendant argues should have been suppressed because the State allegedly failed to show that he had waived his Miranda rights. A defendant may waive his Miranda rights, provided the waiver is made voluntarily, knowingly and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Neither a specific written nor oral waiver is necessary, the question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the right delineated in the Miranda case. *North Carolina v. Butler*, 441 U.S.

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369, 60 L.Ed. 2d 286, 99 S.Ct. 1755 (1979). In the present case, all the evidence presented at the *voir dire* hearing on the motion to suppress showed that the defendant's statements to the officer were made freely and voluntarily and with the full understanding of his rights. The trial court properly admitted the statements made by the defendant following his arrest.

In the trial we find no prejudicial error.

No error.

Judges WEBB and WELLS concur.

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PAUL MACK BAUGH v. JAMES C. WOODARD, SECRETARY OF THE NORTH  
CAROLINA DEPARTMENT OF CORRECTION

No. 8110SC558

(Filed 2 March 1982)

**1. Rules of Civil Procedure § 56— questions of law—summary judgment**

Summary judgment was proper where only questions of law were presented for determination by the court.

**2. Convicts and Prisoners § 2— prisoner receiving mental health treatment—access to mental health records**

The legislature did not intend that prison-operated mental health facilities be included within the meaning of "treatment facility" as defined in G.S. 122-36(g) so as to give a prisoner undergoing mental health care in prison a right of access to his mental health records pursuant to G.S. 122-55.2. Rather, the rights and privileges of mental health patients who are in the custody of the Department of Corrections are determined by the rules and regulations adopted by the Department pursuant to G.S. 143B-261.1.

**3. Convicts and Prisoners § 2— inspection of mental health records—no common law right**

A prisoner does not have a common law right to inspect his mental health records.

**4. Convicts and Prisoners § 2— denial of access to prison mental health records—no violation of equal protection**

Prisoners receiving mental health treatment who are transferred pursuant to G.S. 122-85 to treatment facilities operated by the Department of Human Resources are not entitled to have their mental health records provided to their attorneys pursuant to G.S. 122-36(g) and G.S. 122-55.2; rather, they



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are subject to an administrative rule adopted pursuant to G.S. 143B-261.1 which does not extend to prisoners or their attorneys the right to see the prisoners' mental health records. Therefore, the equal protection rights of a prisoner receiving mental health treatment in prison were not violated by the denial to his attorney of access to his mental health records since there was no disparity concerning the mental health records of prisoners receiving treatment in prison and those receiving treatment in a Department of Human Resources facility.

**5. Constitutional Law § 78; Convicts and Prisoners § 2— denial of prisoner access to mental health records—no cruel and unusual punishment**

The denial to a prisoner of access to his mental health records does not subject him to cruel and unusual punishment.

APPEAL by plaintiff from *Preston, Judge*. Order entered 3 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals on 2 February 1982.

This appeal arises from a civil class action wherein plaintiff, an inmate of the Goldsboro Unit of the North Carolina Department of Correction and suing in behalf of himself and all prisoners and former prisoners, seeks an injunction requiring defendant to provide each prisoner who has undergone psychiatric or psychological treatment while in prison with direct access to the psychiatric or psychological records generated by such treatment. Defendant, after filing an answer to plaintiff's complaint, moved pursuant to Rule 12(b)(6) to dismiss the complaint. In a hearing on such motion, the court, "out of an abundance of caution and recognizing the status of plaintiff as a prisoner[,] allowed the parties to present live testimony." "Upon considering all the competent evidence[,] the briefs and arguments of counsel for both parties," the court entered extensive findings of fact and made extensive conclusions of law, and ordered that plaintiff's complaint "be dismissed with prejudice." From such order, plaintiff appealed.

*Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for plaintiff appellant.*

*Attorney General Rufus L. Edmisten, by Assistant Attorney General James Peeler Smith, for defendant appellee.*

HEDRICK, Judge.

[1] "A Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment

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when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E. 2d 611, 627 (1979); G.S. § 1A-1, Rule 12(b). In the present case, the court considered live testimony, and, hence, its ruling must be reviewed as if it were a ruling on a motion for summary judgment. *See Roach v. City of Lenoir*, 44 N.C. App. 608, 261 S.E. 2d 299 (1980). "Summary judgment may be granted . . . where only a question of law . . . is in controversy. . . ." *Calhoun v. Calhoun*, 18 N.C. App. 429, 432, 197 S.E. 2d 83, 85 (1973). In the present case, plaintiff presents three different legal theories to support his claim for direct access to his mental health records. In two of these theories, *i.e.*, that he has a statutory right and a common law right to direct access, purely legal questions are presented. His third theory rests on three constitutional arguments in favor of direct access; in these arguments, plaintiff contends that a regulation made by defendant which restricts access to mental health records is unconstitutional. Since the general rule is that the constitutionality of a statute is to be determined from merely an examination of the statute itself and of only those matters of which the court may take judicial notice, *State ex rel. Maxwell v. Kent-Coffey Manufacturing Co.*, 204 N.C. 365, 168 S.E. 397 (1933), *aff'd per curiam*, 291 U.S. 642, 78 L.Ed. 1040, 54 S.Ct. 437 (1934), plaintiff's constitutional arguments present a question of law and are properly susceptible to summary judgment. Since this cause revolves only around questions of law, plaintiff's assignment of error directed to the admission of certain testimony pertaining to a constitutional issue is irrelevant to this appeal. Further, it should be noted in this review of the court's entry of summary judgment, that findings of fact and conclusions of law made by a trial judge in his determination on a motion for summary judgment are disregarded on appeal. *Stone v. Conder*, 46 N.C. App. 190, 264 S.E. 2d 760 (1980). Hence plaintiff's assignment of error directed to certain findings of fact made by the trial judge are irrelevant to this appeal.

[2] Plaintiff's first theory is that he is entitled to have access to his mental health records by the language of G.S. § 122-55.2, which prescribes the rights of patients in "treatment facilities," and states,

that no restriction may be placed upon the right of any patient to communicate with an attorney of the patient's choice,

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to have the attorney visit with him and, with the consent of the patient, to have the attorney provided with copies of all pertinent records and information relating to the patient.

Plaintiff argues that he is covered by G.S. § 122-55.2 in that he is a patient in a treatment facility as defined by G.S. § 122-36(g), which states that

“[t]reatment facility” shall mean any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness. . . .

Assuming arguendo that even non-prisoner “treatment facility” patients may require disclosure to them of their mental health records absent a court order compelling such disclosure, *but see* G.S. § 122-8.1(a), the legislature could not have contemplated that prison-operated mental health facilities be included within the meaning of “treatment facility” as defined in G.S. § 122-36(g). If they were so included, then prisoners undergoing mental health care in prison would be entitled, by virtue of G.S. § 122-55.2 and their mere status as mental health patients, to a whole panoply of rights and privileges not afforded to ordinary prisoners not receiving mental health treatment. For instance, G.S. § 122-55.2 (b)(5), (d) would afford a prisoner undergoing mental health treatment with the right, subject to restriction only upon a detailed written statement of the reasons for such restriction, to “[k]eep and use his own clothing and personal possessions”; hence, such prisoner could keep and use more than two sets of personal clothing, shoes with heels of more than one and a half inches in height, and radios worth more than fifty dollars apiece. Ordinary prisoners, on the other hand, generally are limited to no more than two sets of personal clothing, 5 N.C.A.C. 2F .0502(b)(2), (3), (4); are never permitted to have shoes with heel heights of more than one and a half inches, 5 N.C.A.C. 2F .0502(a)(1), (b)(1); and are never permitted to have radios worth more than fifty dollars apiece, 5 N.C.A.C. 2F .0503(6). The legislature could not have intended such a disparity between those prisoners receiving mental health care and those who were not. In construing a statute, “[t]he General Assembly is presumed to have acted in accord with reason and common sense and not to have intended an unjust or absurd result.” *Grissom v. North Carolina Department of*

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*Revenue*, 28 N.C. App. 277, 280, 220 S.E. 2d 872, 875, *disc. rev. denied*, 289 N.C. 613, 223 S.E. 2d 391 (1976). Hence, prisoners receiving mental health care are not covered by G.S. §§ 122-36(g), -55.2; the statute applies only to mental health patients who are not imprisoned with the Department of Corrections. As to mental health patients who are in the custody of the Department of Corrections, their rights and privileges are determined by the rules and regulations adopted by the Department of Corrections pursuant to G.S. § 143B-261.1. Plaintiff's statutory theory is therefore without merit.

[3] Plaintiff also advances the theory that "prisoners have a common law right to inspect their psychiatric records." The common law rule, however, is that prison records of inmates are confidential and are not subject to inspection by the inmate concerned. *Goble v. Bounds*, 281 N.C. 307, 188 S.E. 2d 347 (1972); *see also Paine v. Baker*, 595 F. 2d 197 (4th Cir.), *cert. denied*, 444 U.S. 925, 62 L.Ed. 2d 181, 100 S.Ct. 263 (1979). Although there are exceptions to the common law prohibition of disclosure, *see, e.g.*, 5 N.C.A.C. 2D .0601(b) (permitting disclosure to an inmate's attorney of medical records, except for psychiatric or psychological evaluations), the rule in *Goble* remains as a refutation of any argument that there is a common law right to inspect any prison records, including prison psychiatric and psychological records. This "common law" theory is without merit.

[4] Plaintiff next argues that disallowing him direct access to his mental health records denies him equal protection of the law in that prisoners receiving mental health treatment who are transferred pursuant to G.S. § 122-85 to treatment facilities operated by the Department of Human Resources for their treatment would be entitled, by G.S. §§ 122-36(g), -55.2(d), to have their attorney provided with their mental health records, whereas those prisoners who remained in the Department of Corrections for mental health treatment would not be so entitled. Plaintiff argues that this disparity in treatment is arbitrary and unconstitutional.

Plaintiff posits a disparity in treatment between those prisoners receiving mental health care in a Department of Human Resources facility and those prisoners who remain in prison for such care. Such a disparity, however, would exist only if the

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former group of prisoners were covered by G.S. §§ 122-36(g), -55.2. Such prisoners, having been actually transferred to a DHR-operated "treatment facility" would arguably be subject to G.S. §§ 122-36(g), -55.2, and would thereby be arguably entitled to have their attorneys provided with their mental health records. Because of their status as prisoners, however, they are also arguably subject to any regulations made by the Department of Corrections pursuant to G.S. § 143B-261.1, which states that "[t]he Department of Correction shall adopt rules and regulations related to the conduct, supervision, rights and privileges of persons in its custody or under its supervision"; one such regulation is 5 N.C.A.C. 2D .0601(b), which does not extend to prisoners or their attorneys the right to see their mental health records.

The question, therefore, is which of two arguably conflicting rules apply to prisoners receiving mental health care in a DHR-operated facility. When a statute is reasonably susceptible of two constructions, one of which will raise a serious constitutional question and the other will avoid such question, the court must adopt the construction which avoids the constitutional question. *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977). Since a disparity raising a constitutional question exists only if G.S. §§ 122-36(g), -55.2 apply to prisoners receiving care in DHR-operated facilities, the proper construction of those statutes is to restrict their applicability to non-prisoner mental health patients. With respect to those prisoners receiving care in DHR-operated facilities, G.S. § 143B-261.1 and 5 N.C.A.C. 2D .0601(b) apply, as they do to those prisoners who remain in prison for their mental health care. Hence, plaintiff's alleged disparity disappears in that no prisoners are allowed access to their mental health records, and plaintiff's equal protection argument must fail.

Plaintiff next argues that denying him the right to inspect his mental health records deprives him of a property right without affording him procedural due process. "At the threshold of any procedural due process claim is the question of whether the complainant has a liberty or property interest, determinable with reference to state law, that is protectible under the due process guaranty." *Maines v. City of Greensboro*, 300 N.C. 126, 134, 265 S.E. 2d 155, 160 (1980). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of

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it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L.Ed. 2d 548, 561, 92 S.Ct. 2701, 2709 (1972). As discussed above, there are no statutory or common law rules which would secure to a prisoner a property right in the mental health records generated while he is in prison; plaintiff, therefore, has no more than a unilateral desire for access to his prison mental health records. He has no legitimate claim of entitlement protected by procedural due process. His "due process" theory is without merit.

[5] Finally, plaintiff advances the theory that denying him direct access to his mental health records "constitutes cruel and unusual punishment" in violation of the Eighth Amendment. Penal measures violate the Eighth Amendment if they "are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' . . . or . . . 'involve the unnecessary and wanton infliction of pain.'" *Estelle v. Gamble*, 429 U.S. 97, 102-03, 50 L.Ed. 2d 251, 259, 97 S.Ct. 285, 290 (1976). The penal measure at issue in the present case is the withholding from prisoners direct access to their prison mental health records. Failure to provide such access, particularly in light of the defendant's interest in maintaining the confidentiality of the records so as to preclude the possibility of prisoner retaliation against, *e.g.*, any inmates who may have provided defendant with information about a prisoner's behavior, can hardly be said to offend "evolving standards of decency." Similarly, the mere withholding of direct access from prisoners can hardly result in the infliction upon the prisoner of *any* pain, much less "unnecessary and wanton pain." Plaintiff's "cruel and unusual punishment" theory is therefore without merit.

Having concluded that all of plaintiff's legal theories are unavailing, we hold that defendant was entitled to judgment as a matter of law and that the entry of what amounts to a summary judgment against defendant must be

Affirmed.

Judges HILL and BECTON concur.

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**In re Election of Commissioners**

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**IN RE: ELECTION OF CLEVELAND COUNTY COMMISSIONERS: PROTEST  
OF BOBBY CRAWFORD**

No. 8127SC580

(Filed 2 March 1982)

**1. Elections § 10— contested election—space between names on ballots—violation not requiring new election**

In an action in which petitioner argued that the 4 November 1980 election for Cleveland County Commissioners should be nullified and that a new election should be held on the grounds that the 4 November ballots did not leave sufficient space between the names of candidates printed on such ballot, pursuant to G.S. § 163-140(a), the State Board of Elections properly ruled that a new election was not required. The statute violated did not expressly condition the validity of an election on compliance with the statute's terms; hence, a violation of the "sufficient ballot space" section would not vitiate an election unless the violation altered the outcome of the election, and the Board found as fact that the violation did not alter the election's outcome.

**2. Elections § 8.1— contested election—burden of proof for unsuccessful candidate**

Since petitioner, who contested an election for county commissioners, was an unsuccessful candidate, he had the burden of showing that the irregularities in the election affected the results. Possible complications in getting voters to disclose for whom they would have voted had there been no election irregularities, does not indicate all statutory violations should per se render an election invalid.

**3. Elections § 10— failure to count ballots marked improperly—proper**

Under G.S. § 163-170(1), the State Board of Elections properly ruled that ballots cast in a 1980 election in which the voter marked the straight Democratic circle and also wrote in some, but less than the required three, names for the office of county commissioner, should not be counted for any of the candidates whose names were printed on the ballot or for the candidate or candidates written in.

APPEAL by petitioner from *Cornelius, Judge*. Judgment entered 25 March 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals on 4 February 1982.

This appeal arises from a decision of Superior Court affirming an order of the State Board of Elections.

Petitioner was a write-in candidate in the 4 November 1980 election for the position of Cleveland County Commissioner. Displeased with the conduct and results of that election, petitioner filed an "official protest" with the Cleveland County Board

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of Elections. Upon rejection by the Cleveland County Board of his plea for relief, petitioner appealed to the State Board of Elections for a de novo hearing. The State Board conducted a hearing at which it heard evidence, and thereafter made detailed findings of fact and conclusions of law and ordered that all hand-counted and certain machine-counted ballots cast in the 4 November election for County Commissioner be recounted and that the Cleveland County Board of Elections, upon completion of the recount, certify the results of the election as reflected by the reexamination and recount. The State Board also concluded that a new election for the offices of Cleveland County Commissioners was not justified. Petitioner, after the votes were recounted, still lacked sufficient votes to gain election to the position of Cleveland County Commissioner. He then petitioned the Superior Court for judicial review of the order by the respondent State Board of Elections. The Superior Court "fully reviewed, examined and considered the administrative decision of the respondent . . . and the record upon which said administrative decision rest[ed]," and concluded that

[t]he Findings of Fact and Order of the respondent [t]herein are supported by competent, material, and substantial evidence in view of the entire record as submitted, and the substantial rights of the petitioners have not otherwise been prejudiced; that said Order is in compliance with applicable constitutional provisions and is within the statutory authority or jurisdiction of the respondent; that said Order was entered pursuant to law and lawful procedure, is neither arbitrary nor capricious, and upon the entire Record the Order [t]herein judicially reviewed should be affirmed.

Petitioner appealed to this Court.

*Guller and Bridges, by Jeffrey M. Guller and Thomas B. Kakassy, for petitioner appellant.*

*Attorney General Rufus L. Edmisten, by Deputy Attorney General James Wallace, Jr., for respondent appellee.*

HEDRICK, Judge.

The State Board of Elections, the decision of which is the basis of this appeal, is an "agency" as defined in G.S. § 150A-2(1).



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When a petition for judicial review of an agency decision is filed pursuant to G.S. 150A-45, the judge of superior court may affirm, remand, reverse, or modify the agency decision. G.S. § 150A-51. "If the court reversed or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification." G.S. § 150A-51. "Any party to the review proceedings . . . may appeal to the appellate division from the final judgment of the superior court under rules of procedure applicable to other civil cases." G.S. 150A-52.

While the record in the present case contains exceptions and assignments of error relating to the findings and conclusions and order of the State Board of Elections, there are no exceptions or assignments of error to the "final judgment" of the Superior Court affirming the decision of the State Board.

Rule 10(a) of the Rules of Appellate Procedure "provides in part that 'the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments in the record.'" *Swygert v. Swygert*, 46 N.C. App. 173, 180, 264 S.E. 2d 902, 907 (1980). Since the record in the present case contains no exceptions or assignments of error, no question is presented to this Court for review, *Caudle v. Ray*, 50 N.C. App. 641, 274 S.E. 2d 880 (1981), other than such questions as the regularity of the judgment, if those questions are properly raised in the brief. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Petitioner has not raised in his brief the question of the judgment's regularity; nevertheless, a recitation in the judgment negated each of the possible grounds provided in G.S. § 150A-51 for reversal of an agency decision, and, hence, the form of the judgment affirming the State Board's order was entirely proper.

We will also proceed to review those and only those arguments advanced in petitioner's brief which were ruled upon by the State Board.

[1] First, petitioner argues that the 4 November 1980 election for county commissioners should be nullified and that a new election should be held on the grounds that the 4 November ballots did not leave sufficient space beneath the names of candidates printed on such ballot, and therefore voters were deprived of an

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opportunity to conveniently write in the persons of their choice for county commissioner.

G.S. § 163-140(a), which applies to ballots in elections of county commissioners, states, "All general election ballots shall be prepared in such a way as to leave sufficient blank space beneath each name printed thereon in which a voter may conveniently write the name of any person for whom he may desire to vote." The effect of a violation of a statute governing the conduct of an election depends on the nature of the statute violated, as follows: (1) if the statute expressly declares that a particular act is essential to the validity of an election, or that its omission shall render the election void, the violation of the statute will per se render the election invalid; (2) if, however, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, the violation of the statute will invalidate the election only upon a showing by the contesting candidate or party that the election would have produced different results had the violation not occurred. See *Green v. Briggs*, 243 N.C. 745, 92 S.E. 2d 149 (1956); *Penland v. Town of Bryson City*, 199 N.C. 140, 154 S.E. 88 (1930); *Riddle v. Cumberland County*, 180 N.C. 321, 104 S.E. 662 (1920); *Starbuck v. Town of Havelock*, 255 N.C. 198, 120 S.E. 2d 440 (1961); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E. 2d 139 (1967); *In re Clay County General Election*, 45 N.C. App. 556, 264 S.E. 2d 338, *disc. rev. denied*, 299 N.C. 736, 267 S.E. 2d 672 (1980).

In the present case, the State Board made, *inter alia*, the following unchallenged findings of fact:

4. On the machine ballot, only the three democratic candidates appeared under the office designation . . . ; virtually no space existed between the three candidates' names, and a space measuring approximately 3/8 (three-eighths) inch followed them so that write-ins under each individual name were impossible and space following the last candidate's name was so limited as to make the insertion of three write-in names difficult;

. . .

15. A proper tabulation of write-in votes cast in the November 4, 1980 election will result in an outcome which

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fairly and adequately represents the will of the majority of Cleveland County voters, no other irregularities which would have effected [sic] the outcome of said election having been shown.

Hence, the State Board acknowledged that the election was marred by an irregularity in the form of insufficient ballot space for write-in candidates. The State Board, however, also found as fact that a proper tabulation of the votes cast on 4 November would produce an accurate representation of the will of the majority of voters, and the Board thereby negated any factual finding that had there been sufficient ballot space the results would have been different. Having found that the irregularity did not affect the outcome of the election, the State Board then made the unchallenged conclusion of law that

[t]he irregularities which occurred in the November 4, 1980 general statewide election conducted in Cleveland County were not of such magnitude as to inveigh against the integrity of the voting process or to justify, for any other reason, this Board's ordering a new election for the offices of Cleveland County Commissioners. . . .

The statute violated in the present case did not expressly condition the validity of an election on compliance with the statute's terms; hence, a violation of the "sufficient ballot space" portion of G.S. § 163-140(a) would not vitiate an election unless the violation altered the outcome of the election. Since the Board found as fact that the violation did not alter the election's outcome, it properly ruled that a new election was not required.

[2] Petitioner contends that *In re Clay County General Election, supra*, mandates the overturning of an election upon a statutory violation even absent a showing that the violation affected the outcome. In that case, the State Board did invalidate an election despite there being no showing that the election irregularities affected the election outcome. The Court, however, noted that the State Board, not an unsuccessful candidate, was the party moving to have the election invalidated, and the Court asserted, "Clearly, if an unsuccessful candidate seeks to invalidate an election, he must be able to show that he would have been successful had the irregularities not occurred." *Id.* at 570, 264 S.E. 2d at 346. Since petitioner in the present case is an unsuccessful candidate, he is

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not absolved from the burden of showing that the irregularities affected the results of the election. Petitioner also argues that because of complications in getting voters to disclose for whom they would have voted had there been no election irregularities, all statutory violations should per se render an election invalid. We do not agree. If no voters can be persuaded to volunteer how an irregularity caused them to vote against their will, there should at least be ways to raise an inference of prejudice by circumstantial evidence, when such prejudice does exist. We will not dispense with the requirement that there be a factual determination of whether an irregularity affected an election's outcome when the statute violated does not expressly condition the election's validity on compliance with the statute. "Every reasonable presumption will be indulged in favor of the validity of an election." *Gardner v. City of Reidsville*, *supra* at 585, 153 S.E. 2d at 144. Petitioner's "insufficient ballot space" argument is therefore without merit.

[3] The next argument advanced in petitioner's brief is that the State Board erred in ruling that for those ballots on which a voter marked the straight Democratic circle and also wrote in some, but less than three, names for the office of county commissioner, such ballots shall not be counted for any of the candidates whose names were printed on the ballot or for the candidate or candidates written in.

G.S. § 163-170(1) provides, "If for any reason it is impossible to determine a voter's choice for an office, the ballot shall not be counted for that office but shall be counted for all other offices." The ruling challenged in the present case pertains to those ballots on which a voter indicated he was voting a straight Democratic ticket and also wrote in two names for three of the county commissioner's seats. In that situation, the voter has given conflicting signals as to the candidates for whom he is voting. On the one hand, he has indicated his desire to vote for two write-in candidates; on the other, he has indicated a desire to vote for three Democratic candidates. His write-in votes could be counted as against two of the straight-ticket candidates, but the State Board had no way of knowing which two of the three straight-ticket candidates should have their votes superceded by the write-in votes. Hence, it was impossible to determine the voter's choices for the office of county commissioner, and the State Board properly

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refrained from counting the ballots on which voters marked the straight Democratic circle and also wrote in some, but less than three, names for the office of county commissioner.

Affirmed.

Judges HILL and BECTON concur.

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STATE OF NORTH CAROLINA v. DAVID WOODS AND MCKINLEY MOORE

No. 8126SC829

(Filed 2 March 1982)

**1. Criminal Law § 92.5— denial of motion for severance**

Defendant was not denied a fair trial by the denial of his motion to sever his armed robbery trial from that of a codefendant where all of the evidence at trial portrayed defendant as the gunman and the codefendant as an accomplice, since there was no conflict in the positions at trial of the defendant and the codefendant which was of such a nature as to deny defendant a fair trial.

**2. Criminal Law § 102.6— jury argument—reference to photographs as substantive evidence—absence of objection**

The prosecutor's jury argument referring to photographs as substantive evidence did not constitute such a gross impropriety that it could not have been corrected upon objection, and the trial court did not abuse its discretion in failing *ex mero motu* to strike such argument.

**3. Criminal Law § 102.11— jury argument—comment on guilt or innocence of defendant—absence of objection**

Even if the prosecutor's jury argument that "I just can't buy . . . the story of [defendant] that he just happened to be there" constituted an improper comment on the guilt or innocence of defendant, G.S. 15A-1230(a), such argument did not constitute such a gross impropriety as to require the trial court to strike it *ex mero motu*.

**4. Criminal Law § 113.7— aiding and abetting—instruction on intent**

The trial court's instruction requiring the jury to find that defendant "knowingly aided [the perpetrator] to commit robbery with a firearm" in order to find defendant guilty of armed robbery as an aider and abettor adequately informed the jury that defendant's participation in the crime must have been advertent and pursuant to an intent to assist the actual perpetrator.

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APPEAL by defendants from *Lamm, Judge*. Judgments entered 18 September 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 January 1982.

Defendants appeal from judgments of imprisonment entered upon convictions of armed robbery.

*Attorney General Edmisten, by Associate Attorney General Blackwell M. Brogden, Jr., for the State.*

*Cherie Cox, Assistant Public Defender, for defendant appellant David Woods.*

*Adam Stein, Appellate Defender, for defendant appellant McKinley Moore.*

WHICHARD, Judge.

STATE'S EVIDENCE

Janet Brooks was employed at the Party Junction Store in Charlotte on 15 December 1979 when three men attempted to cash a check there. She declined to cash the check, because company policy precluded this for anyone except old customers. The men paid for their purchase and left.

About one hour later they returned. One put a gun in the face of Ms. Brooks' fellow employee and told him to lie on the floor in the rear of the store. Another placed a gun in Ms. Brooks' face and told her to open the cash register. The third stood "about halfway between the register and the door."

Ms. Brooks gave the gunman "almost a hundred dollars." The man who stood between the register and the door then said, "Let's go man, let's go." The two men thereupon left together.

Ms. Brooks subsequently viewed a series of photographs from which she identified defendant Woods as the gunman and defendant Moore as the accomplice who said, "Let's go, man, let's go." She testified: "[T]here is no doubt about those two individuals in the photographs."

DEFENDANT WOODS' APPEAL

[1] The only assignment of error brought forward is to the denial of defendant Woods' motion to sever his trial from that of

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defendant Moore. He contends he was denied a fair trial and due process because defendant Moore's counsel, in his questioning of witnesses and jury argument, portrayed defendant Woods as the gunman and defendant Moore as a passive observer.

Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed . . . . The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial . . . . In a case where antagonistic defenses were urged as a ground for severance this Court said long ago, 'Unless the accused suffered some apparent and palpable injustice in the trial below, this court will not interfere with the decision of the [trial] court on the motion for a severance.'

*State v. Nelson*, 298 N.C. 573, 586-587, 260 S.E. 2d 629, 640 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282, 100 S.Ct. 1867 (1980).

All the evidence here portrayed defendant Woods as the gunman and defendant Moore as an accomplice. Neither the State nor defendants offered evidence which in any way countered that version of the facts. There thus was no conflict in the defendants' positions at trial of such a nature as to deny defendant Moore a fair trial. In light of the prosecuting witness' uncontradicted and unequivocal identification of defendant Woods as the gunman, there is no "reasonable possibility that . . . a different result would have been reached" had the cases been severed. G.S. 15A-1443. Defendant Woods thus has not sustained his burden of showing prejudice from denial of the motion to sever, and we find no basis for disturbing the trial court's ruling.

DEFENDANT MOORE'S APPEAL

I.

[2] (A) In his closing argument to the jury the prosecuting attorney made the following comment with reference to the prosecuting witness' identification of defendant Moore:

It would be easy for McKinley [Moore]. You see how McKinley has got his hand in his photograph? Can everybody see that, when we passed it around, where McKinley had his

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hands in the photograph? Why do you suppose he's got his hand up by his mouth? Those gold teeth. I submit to you they snapped the shot before he could quite get it all the way up there, but she picked him right out.

Defendant Moore contends that since the photographs were admissible solely to illustrate the witness' testimony, and not as substantive evidence,<sup>1</sup> the prosecutor was improperly arguing facts not in evidence. G.S. 15A-1230(a); *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975).

Ordinarily, an impropriety in counsel's jury argument should be brought to the attention of the trial court before the case is submitted to the jury in order that the impropriety might be corrected . . . . This rule does not apply, however, when the impropriety is so gross that it cannot be corrected . . . . The control of the argument of the district attorney and counsel must be left largely to the discretion of the trial judge and his rulings thereon will not be disturbed in the absence of gross abuse of discretion.

*State v. Hunter*, 297 N.C. 272, 277-278, 254 S.E. 2d 521, 524 (1979).

The record discloses no objection to the argument at trial. We do not find therein "impropriety . . . so gross that it cannot be corrected." *Id.* The prosecuting witness' uncontradicted and unequivocal identification of defendant Moore as the gunman's accomplice rendered unlikely a different result consequent upon exclusion of this portion of the argument. We thus find no basis for holding that the trial court grossly abused its discretion in not acting *ex mero motu* to strike it.

[3] (B) The prosecutor, in his closing argument, also stated: "[B]ut I just can't buy, and I submit you should not either, the story of McKinley Moore that he just happened to be there." Defendant Moore contends this constituted improper argument "as to the guilt or innocence of the defendant." G.S. 15A-1230(a); *State v. Britt*, *supra*.

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1. Photographs are admissible as substantive evidence in trials commencing on and after 1 October 1981. 1981 N.C. Sess. Laws, ch. 451. This trial commenced prior to 1 October 1981, and is thus governed by the rule which allows use of photographs only to illustrate or explain testimony. See 1 *Stansbury's North Carolina Evidence*, § 34 (Brandis Rev. 1973).



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Again, there was no objection to the argument at trial. The impropriety was not "so gross that it cannot be corrected." Hunter at 278; 254 S.E. 2d at 524. A different result consequent upon exclusion of this argument is also unlikely. We thus decline to hold that the trial court grossly abused its discretion in not acting *ex mero motu* to strike it.

## II.

[4] Defense counsel, in his closing argument to the jury, stated:

If [defendant] was casing the joint, why would he show her some identification, some pictures of himself? He's already standing there with his gold caps on his teeth. He knows they're on there. He's not stupid. Why would he go up there if he's casing the joint for a later robbery and present some identification with his name on it?

The prosecutor's objection, on the ground that there was no evidence that any identification had defendant's name or picture thereon, was sustained. Defendant contends there was such evidence, *viz.*, the following in the prosecuting witness' testimony:

Q. And when [defendant] was talking with you during that time [i.e., the visit about one hour before the holdup], . . . he showed . . . you all sorts of identification, including a picture of him in his uniform and a driver's license and various pieces of identification. Did he not?

A. Yes.

Assuming, *arguendo*, that the argument was proper, and its exclusion thus error, we again find no "reasonable possibility that . . . a different result would have been reached" had the objection been overruled. G.S. 15A-1443. There was uncontroverted evidence that the prosecuting witness did not look at these identifying items. She testified that she saw them lying on the counter, but did not study them; and that she did not pay any attention to them, because she had already told defendant she could not cash his check. Further, defendant's state of mind upon his initial visit to the store is inconsequential in light of the uncontroverted and unequivocal identification of defendant as the accomplice who, on the second visit, stood by while the holdup was in process and when it was complete said to the gunman, "Let's go, man, let's

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go.” Defendant has failed to sustain his burden of showing prejudice in the sustention of the prosecutor’s objection to the argument.

III.

[5] Defendant Moore finally contends the court erred in its jury instruction on aiding and abetting by failing to inform the jury that one who aids and abets must share the felonious intent of the principal perpetrator of the crime. The portions complained of were as follows:

A person may be guilty of robbery with a firearm, although he does not personally do any of the acts necessary to constitute that crime. A person who aids and abets another to commit robbery with a firearm is guilty of that crime. You must clearly understand that if he does aid and abet, he is guilty of robbery with a firearm just as if he had personally done all of the acts necessary to constitute the crime. Now, I charge that for you to find a defendant guilty of robbery with a firearm because of aiding and abetting, the State must prove beyond a reasonable doubt; first, that robbery with a firearm was committed by the defendant, David Woods. You will recall that I have just instructed you on the seven things that the State must prove beyond a reasonable doubt with respect to robbery with a firearm. And, second, the State must prove to you that the defendant was present at the time the crime was committed and that he knowingly aided David Woods to commit that crime. However, a person is not guilty of a crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intend to assist in its commission. To be guilty, he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission.

. . . .

As to the defendant, McKinley Moore, I charge that if you find from the evidence beyond a reasonable doubt that on or about December 15, 1979, David Woods committed robbery with a firearm and that McKinley Moore was present at the time the crime was committed and looked about and then

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said, "Let's go, man, let's go. [sic]" and that, in so doing, McKinley Moore knowingly aided Daivd Woods to commit robbery with a firearm, it would be your duty to return a verdict of guilty of robbery with a firearm, as to the defendant, McKinley Moore. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to the defendant, McKinley Moore.

Our Supreme Court has stated:

'All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. . . . An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime . . . . To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary.'

*State v. Aycoth*, 272 N.C. 48, 51, 157 S.E. 2d 655, 657 (1967). The instructions given here fully and adequately informed the jury regarding this standard. The phrase "knowingly aided . . . to commit [the] crime" clearly mandated, as a prerequisite to a finding of guilt, a determination that defendant's participation in the crime was advertent and pursuant to an intent to assist the actual perpetrator. The jury could not have been misled to believe otherwise.

This court has upheld an instruction that the jury could convict "if it found beyond a reasonable doubt that the defendant was present when [the actual perpetrator] committed the crime and that the defendant *knowingly* encouraged and *aided* [the perpetrator] . . . ." *State v. Cassell*, 24 N.C. App. 717, 723, 212 S.E. 2d 208, 212, *cert. denied* and *appeal dismissed*, 287 N.C. 261, 214 S.E. 2d 433 (1975). (Emphasis supplied.) The instruction given here was derived almost verbatim from the Pattern Jury Instructions. See N.C.P.I.—Criminal 202.20 (1977).

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**Old Dominion Distributors v. Bissette**

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**RESULT**

No error.

Judges CLARK and ARNOLD concur.

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OLD DOMINION DISTRIBUTORS, INC. v. JACK W. BISSETTE AND WIFE,  
PATSY S. BISSETTE

No. 817DC591

(Filed 2 March 1982)

**Constitutional Law § 26.1; Judgments § 51.1— foreign judgment—issue of jurisdiction—summary judgment improper**

In an action to enforce a judgment entered by a Virginia court, the trial court erred in entering summary judgment in favor of plaintiff where there was a genuine issue concerning the jurisdiction of the Virginia court which rendered the judgment. Plaintiffs complaint, affidavit, exhibits and a copy of the judgment of the Virginia court which were offered in support of its motion for summary judgment were not sufficient to establish proper service of process and in personam jurisdiction of the Virginia court over the defendant.

Judge WEBB dissenting.

APPEAL by defendants from *Ezzell, Judge*. Judgment entered 11 March 1981 in District Court, WILSON County. Heard in the Court of Appeals 4 February 1982.

Plaintiff brought a civil action in North Carolina in 1979 to enforce a judgment rendered in Virginia in 1974 awarding plaintiff damages as a result of defendants' breach of contract. The trial court granted summary judgment for plaintiff.

The defendants' original answer in the form of a letter stated that defendant Patsy S. Bissette was approached by a saleslady when she resided in Roanoke, Virginia in 1970. Her husband, defendant Jack W. Bissette, was out of town. She was convinced to agree to purchase food for a freezer that she did not own. After the saleslady phoned her employer, she convinced Mrs. Bissette to sign her husband's name. She was assured by the saleslady that the food order would be delivered anywhere in the United States. After the food was delivered, Mrs. Bissette return-

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**Old Dominion Distributors v. Bissette**

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ed the food to the plaintiffs and gave them a check for the amount of food which was not returned. The Bissettes then moved to North Carolina, residing in Charlotte and later, in Nash County near Wilson. While in North Carolina, the defendants received numerous phone calls regarding payment for food but never received any food or any offer to deliver food.

In defendants' verified answer and counterclaim (received as an affidavit by the trial court), they deny any knowledge of a judgment in Virginia and deny that any notice was given them of the action in Virginia. The defendants further assert that plaintiff knew defendant Jack W. Bissette was not a party to any contract with the plaintiff, but plaintiff nevertheless knowingly and intentionally, maliciously and without probable cause or legal excuse maintained a prosecution against him. Defendant Jack W. Bissette seeks compensatory damages of One Thousand Dollars (\$1,000.00) in said counterclaim and also asks for treble damages and compensation for attorney fees pursuant to N.C. Gen. Stat. § 75-16.

The defendants also filed an affidavit with the court on 22 June 1979 which stated that no contract ever existed between the plaintiff and defendant Jack W. Bissette. Said affidavit also stated that no contract ever existed between the plaintiff and defendant Patsy S. Bissette, but, in the alternative, if it did, said contract was revoked without damage to the plaintiff by non-performance and other action by the plaintiff. Defendants' affidavit further states that defendants were never properly served with process in the original action in Virginia. Plaintiff filed a reply denying the allegations of defendants' counterclaim.

Plaintiff moved for summary judgment. Plaintiff presented four exhibits received into evidence, including copies of two letters sent to defendant Jack Bissette by certified mail from the office of the Secretary of the Commonwealth of Virginia advising him of an enclosed summons. These letters were marked November 15, 1974 and November 19, 1974 and both were returned unclaimed. Two similar letters addressed to the defendant Patsy S. Bissette were received into evidence. The return receipt of the first letter was signed by a third party for Patsy Bissette, and the second letter post-marked November 19, 1974, was returned to sender unclaimed. From summary judgment in favor of the plaintiff, defendants appealed.

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**Old Dominion Distributors v. Bissette**

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*Parker, Miles, Hinson & Williams by C. David Williams, Jr., for the plaintiff-appellee.*

*Farris, Thomas & Farris by William C. Farris for the defendant-appellants.*

MARTIN (Robert M.), Judge.

Defendants' first assignment of error is that the trial court improvidently granted plaintiff's motion for summary judgment in the action by plaintiff to enforce the Virginia judgment. We agree.

Generally this State is required to give "full faith and credit" to the judgment of a sister state pursuant to Art. IV, § 1 of the Federal Constitution. The full faith and credit clause, however, does not prevent inquiry into the jurisdiction of the Virginia court, and if the Virginia court did not have jurisdiction the judgment is void. *Marketing Systems v. Realty Co.*, 277 N.C. 230, 176 S.E. 2d 775 (1970); *State v. Williams*, 224 N.C. 183, 29 S.E. 2d 744 (1944); *Prather, Thomas, Campbell, Pridgeon, Inc. v. Properties, Inc.*, 29 N.C. App. 316, 224 S.E. 2d 289 (1976).

The Virginia judgment, attached as plaintiff's Exhibit A to its complaint, does not refer to that court's jurisdiction over defendants. If the judgment had recited that the court rendering it had jurisdiction, the court of another state in which the judgment is asserted as a cause of action or a defense, could make its own independent determination as to the rendering court's jurisdiction. *Id.* Thus we are not precluded from making an independent inquiry into the jurisdiction of the Virginia court. Only if the jurisdiction is, itself, an issue which has been fully litigated in, and determined by, the foreign court which rendered the judgment, is the judgment entitled to full faith and credit. *Hosiery Mills v. Burlington Industries*, 285 N.C. 344, 204 S.E. 2d 834 (1974); *Prather, Thomas, Campbell, Pridgeon, Inc. v. Properties, Inc.*, *supra*.

In the present case it appears that plaintiff is a Virginia corporation; that the defendants lived in Virginia in 1970 when the alleged contract was entered into; and that defendants moved to North Carolina shortly thereafter and resided in North Carolina in 1974 when plaintiff commenced its action in Virginia. The de-

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**Old Dominion Distributors v. Bisette**

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fendant Jack Bisette asserts that he never entered into a contract with plaintiff; defendants assert that plaintiff refused to perform the contract; and that the Virginia judgment was null and void because no legal and proper service of process was had on defendants.

Clearly, the defendants' answer raised the issue of the jurisdiction of the Virginia court which rendered the judgment. Defendants had the right to raise this issue in North Carolina courts because the issue had not been fully litigated in and determined by the Virginia court, because the defendants did not appear in the Virginia action, and because there is nothing in the record to indicate that they consented to the jurisdiction of that court. *Prather, Thomas, Campbell, Pridgeon, Inc. v. Properties, Inc.*, *supra* at 318, 224 S.E. 2d 291.

On the motion for summary judgment the test is whether the pleadings and materials offered in support of the same show that there is no genuine issue as to any material fact. If there is no such issue, then the sole question for the court's determination is whether the party is entitled to the judgment as a matter of law. *Weaver v. Insurance Co.*, 20 N.C. App. 135, 201 S.E. 2d 63 (1973). The burden is on the movant to establish the lack of genuine issue of material fact, one where the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

We find that the plaintiff's complaint, affidavit, exhibits, and copy of the judgment of the Virginia court which were offered in support of its motion for summary judgment were not sufficient to establish the lack of the genuine issue of material fact, that is, proper service of process and in personam jurisdiction of the Virginia court over the defendants.

The judgment of the trial court apparently granted summary judgment for the plaintiff on defendants' counterclaim. Whether the defendants are entitled to pursue their counterclaim against plaintiff is dependent upon the determination of the issue of jurisdiction by the Virginia court. If the Virginia court properly served the defendants and had in personam jurisdiction over defendants, it is possible that the defendants, having failed to prosecute their counterclaim in Virginia, would be barred from

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prosecuting the same in this action. We, therefore, find that summary judgment on the defendants' counterclaim was im-providently granted.

We have considered the additional questions raised by plain-tiff in its brief and find them to be without merit and overruled.

The summary judgment for plaintiff on its action to enforce the Virginia judgment, and for the plaintiff on defendants' counterclaim, is

Reversed and remanded.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I believe the record shows without contradiction that the defendants were properly served under Section 8.01-320 of the Virginia Code. The Virginia court had jurisdiction of the parties under Section 8.01-328.1(A)(1) of the Virginia Code. The record also shows a default judgment was entered. We are bound by the United States Constitution to give full faith and credit to the Virginia judgment. I vote to affirm the judgment of the district court.

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STATE OF NORTH CAROLINA v. DARRELL GENE WILLIAMS

No. 812SC914

(Filed 2 March 1982)

**1. Burglary and Unlawful Breakings § 5.9— breaking and entering of business premises—sufficiency of circumstantial evidence**

The State's evidence was sufficient for the jury in a prosecution for felonious breaking or entering of an oil company and felonious larceny of property therefrom where it tended to show: (1) some eight days before the crimes, defendant was seen standing outside the oil company's fence where empty oil drums were stored; (2) the perpetrator stood on an oil drum to cross the fence and gain entrance to the oil company's compound; (3) within minutes after defendant was seen outside the fenced-in-area, defendant visited the office that



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was subsequently broken into and had an opportunity to see that money was kept in the filing cabinet and in a can on the refrigerator; (4) approximately eleven hours after the last time the office had been observed unentered and approximately a day and a half before the break-in was discovered, defendant was arrested for driving under the influence after being observed at a site three fourths of a mile from the oil company; (5) when he was arrested, defendant had \$13 in bills and \$5.81 in change while the amount last known to have been in the can at the oil company was between \$6 and \$10 in change and three \$1 bills; (6) a tire tool found in the car defendant was driving had paint flecks on it which were of the same origin as the paint on a broken window at the oil company, and the width of the tire tool was consistent with the pry marks left on that window; and (7) a heel print found two days after the crimes just inside the fence on the oil company's property was made by defendant's boot.

**2. Criminal Law § 163— misstatement of evidence—necessity for objection**

Objections to the trial court's review of the evidence must be made before the jury retires so as to give the trial judge an opportunity to correct any misstatement and thus avoid the expense of a retrial.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 9 April 1981 in Superior Court, STANLY County. Heard in the Court of Appeals 9 February 1982.

Defendant was convicted of felonious breaking or entering and felonious larceny. After the imposition of a prison sentence of not less than nor more than ten years, defendant appealed.

*Attorney General Edmisten, by Associate Attorney William H. Borden, for the State.*

*Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.*

BECTON, Judge.

**I**

[1] Defendant states his first argument thusly: "The trial court erred in denying defendant's motions to dismiss the charges because there was not sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant was the person who committed the offenses."

In order for the evidence to support the charge, there must be "substantial evidence . . . of every essential element that goes to make up the crime charged," *State v. Allred*, 279

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N.C. 398, 404, 183 S.E. 2d 553, 557 (1971), or evidence from which a rational jury may find beyond a doubt the existence of such elements. *Jackson v. Virginia*, 443 U.S. 307 (1979).

*State v. McCoy*, 303 N.C. 1, 24, 277 S.E. 2d 515, 532 (1981). And how are trial courts to view the evidence? The principles are well established: The evidence is to be viewed in the light most favorable to the State; every reasonable inference is to be drawn in favor of the State; all contradictions and discrepancies in the evidence are to be resolved in the State's favor; and the defendant's evidence may be considered if it merely explains or clarifies and is not inconsistent with the State's evidence. *State v. McCoy*.

These general principles apply in every case, whether the evidence is circumstantial or direct, or both. And while it may be proper in a wholly circumstantial evidence case to instruct the jury that the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt, it is improper for the trial judge to use this standard at the nonsuit stage. As stated by Justice Higgins in *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E. 2d 431, 433-34 (1956):

It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. [Citations omitted.]

To connect defendant to the crime charged in the case *sub judice*, the State presented evidence (1) that, on 6 February 1981, defendant was seen standing outside the oil company's fence where empty oil drums are stored and where, according to the State's theory, defendant jumped over the fence to gain entrance to the oil company's compound on 14 February 1981;<sup>1</sup> (2) that

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1. The evidence in the light most favorable to the State tends to show that defendant's footprints were found approximately 200 feet away from the building and

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within minutes after defendant had been seen outside the oil company's fenced-in-area, defendant visited the office that was subsequently broken into and had an opportunity to see that money was kept in the filing cabinet and in a can on the refrigerator; (3) that on 14 February 1981 the defendant was arrested for driving under the influence after first being observed at a site  $\frac{3}{4}$  of a mile from the oil company (this was approximately 11 hours after the last time the office had been observed unentered and approximately a day and a half before the break-in was discovered); (4) that when he was arrested, defendant had \$13 in bills and \$5.81 in change while the amount last known to have been in the can at the oil company was between \$6 and \$10 worth of change and three \$1 bills; (5) that a tire tool found in the car defendant had been driving had paint flecks on it that were of the same origin as the paint on the broken window at the oil company, and the tire tools' width was consistent with the pry marks left on that window; and (6) that a heel print found on 16 February 1981 just inside the fence on the oil company's property was made by defendant's boot.

For the sake of argument, we accept defendant's suggestion that the first four "pieces of evidence" taken singly or in combination are of little probative value. Similarly, we have no quarrel with defendant's suggestion that the tire tool evidence, if considered separate and apart from the other evidence, is insufficient to connect the defendant to the crime charged. We also agree with defendant's contention that the footprint evidence, considered by itself, "casts suspicion upon defendant but fails to constitute evidence from which a rational trier of fact could find defendant guilty of this offense beyond a reasonable doubt." Indeed, viewing each piece of circumstantial evidence singly, we see how defendant finds solace in *State v. Burton*, 272 N.C. 687, 158 S.E. 2d 883 (1968), a pry tool case, and *State v. Batts*, 269 N.C. 694, 153 S.E. 2d 379 (1967), a footprint case. *Burton* and *Batts* are distinguishable, however, as the following analysis shows.

In *Burton*, the only evidence linking the defendants to the safecracking of a particular warehouse was the fact that they

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indicated that defendant walked towards the fence which had a strand of barbed wire on top, and after crossing this by standing on an oil drum, leaving mud behind, continued toward the building. Mud tracks were found in the building leading from the broken window back to the room where the safe was located.

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were found three days later in another warehouse in possession of a crowbar which an expert testified was used to pry open the safe in the first warehouse. Our Supreme Court held the evidence insufficient to support the conviction, noting that although the evidence was sufficient to put the instruments used at the scene of the crime in defendant's possession, whether one of the defendants, both of the defendants, or either of the defendants was the person or persons who cracked the safe in the first warehouse remained in the realm of speculation and conjecture. In *State v. Batts*, missing items from a break-in were found the morning following the break-in in a cornfield 100 yards from the victim's home and fifty yards from the defendant's grandmother's home. Shoe tracks later determined to match defendant's shoes were found in the cornfield where the stolen property was recovered. The prints started in the cornfield adjacent to the victim's yard but could not be traced through the yard to the house. Our Supreme Court held this evidence sufficient only to raise suspicion and conjecture and reversed the conviction. Compare *State v. Marze*, 22 N.C. App. 628, 207 S.E. 2d 359 (1974), in which this Court considered the fact that defendants were apprehended in a wooded area approximately two miles from the scene of a break-in, and held that a tennis shoe print found on the door of the home had no tendency to link defendant to the crime, there being no showing that the shoe print was made at the time of the crime or that the shoe print corresponded to the tennis shoes worn by one of the defendants.

The facts in *Burton*, *Batts*, and *Marze* compelled no conclusions other than the ones reached. The case at bar involves more than "tire tool" evidence; it involves more than "footprint" evidence. All the circumstances, the total combination of facts must be considered in determining the sufficiency of the evidence. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). In *Irick*, defendant's fingerprint was found among a number of unidentified prints around the window a burglar entered. The *Irick* Court concluded that the fingerprint evidence, standing alone, was insufficient for the jury to find that defendant impressed the print at the time the crime was committed; however, the Court held that the fingerprint along with the following evidence was sufficient to withstand a motion for nonsuit: (1) defendant had been observed coming from the general direction of the burglarized home; (2)

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defendant was tracked by bloodhounds to a car from the site of another robbery where a dish towel from the burglarized home was found; (3) the defendant had the same denominations and amounts of money in his pocket as was stolen; and (4) defendant attempted to flee from police officers. *See also State v. Randolph*, 39 N.C. App. 293, 250 S.E. 2d 318 (1979), *appeal dismissed* 297 N.C. 179, 254 S.E. 2d 40 (1979).

Because the evidence at the nonsuit stage need not rule out every reasonable hypothesis of guilt, the evidence connecting the tire tool by pry marks and paint flecks to the window that was broken into, taken together with all the other circumstantial evidence, is sufficient for a jury to find beyond a reasonable doubt that the defendant committed the crime in question.

## II

[2] Having reviewed the court's instructions to the jury in its entirety, we reject defendant's next assignment of error that "[t]he trial court erred in presenting a summary of defendant's evidence and contentions which was incomplete, deprecated defendant's evidence, failed to include essential defense evidence, unfairly weighed the case in favor of the State, and constituted an expression of opinion in violation of G.S. 15A-1232." We find nothing in the charge suggesting that the trial judge's summary of the evidence prejudiced the defendant.

We deem it necessary to state again an often repeated rule: Objections to the trial court's review of the evidence must be made before the jury retires so as to give the trial judge an opportunity to correct any misstatement and thus avoid the expense of retrial. The record does not indicate that trial counsel made any objection to the court's summary of the evidence.

Believing that this case is distinguishable from *Burton* and *Batts* and indistinguishable from *Irick* and finding that defendant was not otherwise been prejudiced, we conclude that the trial court committed

No error.

Judge HEDRICK and Judge HILL concur.

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STATE OF NORTH CAROLINA v. ANTHONY ARMISTEAD BOWEN

No. 8128SC873

(Filed 2 March 1982)

**1. Conspiracy § 4.1— sufficiency of indictment**

An indictment which charged that defendant conspired with another person to obtain certain tools and equipment from a store by means of forging a signature to a purchase order, set forth the purpose and object of defendant and the other person, and was sufficient to apprise defendant of the charge of conspiracy.

**2. Constitutional Law § 46— effective assistance of counsel**

The trial judge did not err in denying defendant's motion to replace his court-appointed counsel where defendant complained that his relationship with his court-appointed counsel had deteriorated, and where defendant's complaints about his counsel were based on matters of law and trial tactics.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 2 April 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 2 February 1982.

Defendant was charged as follows:

[Defendant] did unlawfully, wilfully, and feloniously conspire with Richard Keith Garren to feloniously, knowingly and designedly with the intent to cheat and defraud obtain [certain equipment and tools] from Village True Value Hardware, Inc., . . . without making proper compensation or bona fide arrangements for compensation. This property was obtained by means of forging a signature to a purchase order . . . from Stroupe Sheet Metal Works, Incorporated, . . . and obtaining the [equipment and tools] from Village True Value Hardware, Inc., having bill charged to Stroupe Sheet Metal Works, Incorporated, without their consent. The pretense made was calculated to deceive and did deceive . . .

He was found guilty of conspiracy, as charged. Defendant appeals from a judgment of imprisonment.

*Attorney General Edmisten, by Assistant Attorney General Lemuel W. Hinton, for the State.*

*Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant-appellant.*

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HILL, Judge.

The State's evidence tended to show that on 24 July 1980, defendant and Richard Keith Garren discussed using a purchase order from Stroupe Sheet Metal Works to get come tools to sell at the flea market. Kay Ballinger saw defendant sign the name "Ed Smith" on the purchase order; she later gave the purchase order to Garren along with a list of things to get from the Village True Value Hardware Store [hereinafter referred to as "the store"].

Upon receiving instructions from defendant, Garren and Ballinger went to the store on the morning of 25 July. The store clerk "got all the things that I asked for," Garren testified. Garren signed an invoice, "Ed Smith, V.S.S. Job," received the equipment and tools, and left with Ballinger to go to the Dream Land Flea Market. Defendant already was waiting for Garren and Ballinger, and "[a] substantial part of what had been bought at the store was sold at the flea market." Defendant kept the articles that were not sold. Defendant presented no evidence.

[1] In his first argument, defendant contends that the indictment, quoted above, is insufficient to charge the offense of conspiracy and that he thereby was deprived of his constitutional rights to indictment and notice of the charges against him.

An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction.

*State v. Lowe*, 295 N.C. 596, 603, 247 S.E. 2d 878, 883 (1978). See *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977), *cert. denied*, 434 U.S. 998 (1978); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlwful way or by unlawful means . . . . As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E. 2d 521, 526 (1975). *Accord*, *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978).

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Taken as a whole, then, we must determine whether the indictment *sub judice* sufficiently charges the offense of conspiracy. See *State v. Blanton*, 227 N.C. 517, 42 S.E. 2d 663 (1947). In so doing, as the State notes, we must find that the indictment clearly sets forth the purpose and object of the persons involved, “‘as in these are to be found almost the only marks of certainty by which the parties accused may know what is the accusation they are to defend.’” *State v. Van Pelt*, 136 N.C. 633, 639, 49 S.E. 2d 177, 180 (1904), quoting *State v. Trammell*, 24 N.C. (2 Ired.) 379, 386 (1842).

The indictment clearly charges that defendant conspired with Garren to obtain certain tools and equipment from the store by means of forging a signature to a purchase order. This information sets forth the purpose and object of defendant and Garren, and is sufficient to apprise defendant of the charge of conspiracy. This assignment of error is overruled.

[2] Defendant’s second argument alleges that the trial judge erred in denying his motion to replace his court-appointed counsel where he had shown a deteriorated relationship between them. The disagreement between defendant and his attorney, defendant argues, denied him effective assistance of counsel. We do not agree.

The right to effective assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution, is made applicable to the states by the Fourteenth Amendment. Since there are no “hard and fast rules” that can be employed to determine a denial of this right, “each case must be examined on an individual basis so that the totality of its circumstances are considered.” *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E. 2d 788, 798 (1981). See *State v. Hensley*, 294 N.C. 231, 240 S.E. 2d 332 (1978).

An accused has the right to conduct his own defense without counsel but he does not have the right to have the attorney of his choice appointed by the court. [Citation omitted.] Neither does the right to competent court-appointed counsel include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney’s services.

*State v. Sweezy*, 291 N.C. 366, 371, 230 S.E. 2d 524, 528 (1976). The decision to appoint a different lawyer for a defendant who is



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dissatisfied with his court-appointed counsel "is a matter committed to the sound discretion of the [trial judge]." *United States v. Young*, 482 F. 2d 993, 995 (5th Cir. 1973), *quoted in State v. Sweezy*, *supra* at 371-72, 230 S.E. 2d at 529. A disagreement over trial tactics, however, generally does not render the assistance of counsel ineffective. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976).

We do not propose to review completely the details of defendant's pretrial relationship with his court-appointed counsel; suffice it to say that defendant's complaints about him are based on matters of law and trial tactics—matters in which counsel is specially trained. The record reveals that defendant was confused about the nature of the charge against him. Regarding the effectiveness of defendant's court-appointed counsel, the following colloquy took place when the trial judge heard defendant on a motion for speedy trial:

COURT: Well, do you have anything else to say to the Court?

DEFENDANT: No sir. I'm completely dissatisfied with Mr. Harrell's representation. He's never questioned me about this charge or about any witness to appear in my behalf.

COURT: Do you want to appear in your own behalf, then, without Mr. Harrell?

DEFENDANT: I don't think I'm qualified without the opportunity to use the law library.

COURT: I don't think you are either. If you'll have a seat, we'll call this case for trial, as soon as we get a jury.

Nothing in the record indicates the conflicts were in any way the fault of counsel; rather, it appears they could have been reconciled with the cooperation of defendant. Under these circumstances, we do not find that the trial judge abused his discretion by denying defendant's motion to replace his court-appointed counsel and proceeding with the trial.

It is not error for the trial judge to consider defendant's complaints about his court-appointed counsel without a formal hearing when defendant makes his "wishes and opinions known frequently

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and vociferously." *State v. Sweezy, supra* at 373, 230 S.E. 2d at 529. Here, the judge clearly was made aware of those complaints.

For the reasons stated above, in defendant's trial, we find

No error.

Judges HEDRICK and BECTON concur.

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MARGIE WILLIAMS DODD v. STATE OF NORTH CAROLINA

No. 8127SC797

(Filed 2 March 1982)

**1. Extradition § 1— grant of extradition—scope of judicial review**

Once the governor of the asylum state has granted extradition, the scope of review of the court considering release on habeas corpus is limited to deciding (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. Art. IV, § 2, Cl. 2 of the U.S. Constitution.

**2. Extradition § 1— charge of crime in indictment—law of demanding state**

The law of the demanding state furnishes the test of whether the indictment has substantially charged a crime, and an indictment charging the petitioner with making a false statement to obtain a credit card substantially charged the petitioner with a crime in Kentucky, the demanding state.

**3. Extradition § 1— person named in extradition papers—burden of proof**

The State did not have the burden of proving beyond a reasonable doubt in an extradition hearing that the petitioner was the person charged in the indictments in the demanding state; rather, petitioner had the burden of showing beyond a reasonable doubt that she was not the person named in the extradition papers.

**4. Extradition § 1— extradition hearing—identification testimony—no necessity for voir dire**

The trial court in an extradition hearing did not err in allowing in-court identification testimony without conducting a voir dire to determine the admissibility of such testimony since an extradition hearing is a summary proceeding heard without a jury, and a voir dire hearing was, therefore, unnecessary.

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**5. Extradition § 1— amendment of indictment—constitutionality of procedures of demanding state—no attack in extradition hearing**

The petitioner may not challenge in an extradition hearing the constitutionality of procedures of the demanding state allowing an indictment to be amended to correct error in the name of the person charged but must do so in the courts of the demanding state.

ON certiorari to review the order of *Friday, Judge*. Judgment entered 24 April 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 11 January 1982.

The following facts, appearing in the record, are not controverted. On 23 January 1981, the Governor of the State of Kentucky issued a requisition demanding the extradition of Margie Williams Dodd. According to the requisition, Dodd was a fugitive from justice, standing charged by indictment and warrant with the crimes of making a false statement to obtain a credit card and theft by deception of over \$100.00. The requisition was accompanied by indictments and bench warrants for the two offenses.

On 3 February 1981, the Governor of this State issued a warrant for the arrest of Dodd. After arrest, the petitioner, Margie Williams Dodd, filed a petition for writ of habeas corpus in which she contended, *inter alia*, that she was not the individual charged in the Kentucky indictments and that the indictments did not meet the requirements of G.S. 15A-723 of North Carolina's Uniform Criminal Extradition Act in that they did not substantially charge her with the commission of a crime. Beginning 20 February 1981, and apparently on two occasions thereafter, hearings were held on the petition, and evidence was presented by both the State and petitioner. The trial court denied the petition for writ of habeas corpus on 24 April 1981, and on 8 May 1981, this Court issued its writ of certiorari to review the trial court's order.

*Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.*

*McConnell, Howard, Pruett and Toth, by Rodney Shelton Toth, for the petitioner.*

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VAUGHN, Judge.

[1] A person charged in any state with treason, felony, or other crime, who flees from justice and is found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up, to be returned to the state having jurisdiction of the crime. U.S. CONST., art. IV, § 2, cl. 2. In *Michigan v. Doran*, 439 U.S. 282, 99 S.Ct. 530, 58 L.Ed. 2d 521 (1978), the Supreme Court clearly established that, once the governor of the asylum state has granted extradition, the scope of review of the court considering release on habeas corpus is limited to deciding (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. The hearing conducted by the court is intended to be a summary proceeding. *Id.*

In the present case, the petitioner's first contention is that the trial court erred in determining that the two Kentucky indictments substantially charged petitioner with crimes. Petitioner argues that, in the indictment alleging that petitioner committed the crime of theft by deception of over \$100.00, the State of Kentucky failed to allege that the petitioner had *intentionally* issued a check knowing that it would not be honored by the drawee. As to the indictment charging the petitioner with making a false statement to obtain a credit card, petitioner contends that the State of Kentucky failed to set forth the particular false statement which the defendant allegedly made.

[2] The law of the demanding state, *i.e.* Kentucky, furnishes the test of whether the indictment has substantially charged a crime. *In re Bailey*, 203 N.C. 362, 166 S.E. 165 (1932), *rev'd. on other grounds*, *South Carolina v. Bailey*, 289 U.S. 412, 53 S.Ct. 667, 77 L.Ed. 1292 (1933). Under the Kentucky Rules of Criminal Procedure, an indictment must contain a plain, concise and definite statement of the essential facts constituting the specific offense with which a defendant is charged. RCr 6.10(2). This rule liberalized earlier Kentucky law which required a detailed statement of the offense charged. Prior to the enactment of RCr 6.10, indictments for theft offenses had to state intent to commit the offense. See *Richards v. Commonwealth*, 195 Ky. 333, 242 S.W. 591 (1922).

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We find no recent case, however, which is helpful to our determination of whether the indictment charging the petitioner with theft by deception of over \$100.00 should, under the new law, include an allegation as to the petitioner's intent.

In view of our belief, however, that the second indictment substantially charges petitioner with the commission of a crime, to wit, making a false statement to obtain a credit card, we deem it unnecessary to decide whether the first indictment was sufficient under Kentucky law. In the second indictment, the petitioner contended that the State of Kentucky should have set forth the specific false statement which she made in order to obtain the credit card. The indictment as we read it tracks almost verbatim the language of the statute under which the petitioner is charged. While the petitioner cites the case of *Gardner v. Commonwealth*, 164 Ky. 196, 175 S.W. 362 (1915) for the proposition that the indictment must set forth the false statement, we find that RCr 6.10 no longer requires this statement. In *Wylie v. Commonwealth*, 556 S.W. 2d 1 (1977) (per curiam), the Supreme Court of Kentucky stated that an indictment under RCr 6.10 is sufficient if it informs the accused of the specific offense with which he is charged and does not mislead him. The court held that an indictment charging defendant with receiving stolen property (a misdemeanor) without alleging that the value of the stolen property was \$100.00 or more (a felony) did not preclude conviction for felonious receipt. In *Brown v. Commonwealth*, 555 S.W. 2d 252 (1977), the Kentucky court held that, where the statute enumerated several means of murder, failure of the murder indictment to state the specific means of the murder was defective *but* sufficient to support a conviction. In the *Brown* case, the Kentucky court emphasized that defense counsel should seek a bill of particulars in order to obtain the specifics of the alleged offense.

Based on the foregoing cases interpreting RCr 6.10, we conclude that the indictment charging the petitioner with making a false statement to obtain a credit card substantially charged the petitioner with a crime in the State of Kentucky.

[3] Petitioner also contends that she was denied due process of law when the trial court found to its "reasonable satisfaction" that the petitioner was the Margie W. Dodd a/k/a Margie L. Williams charged in the Governor's warrant. Petitioner contends

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that the State had the burden of proving beyond a reasonable doubt that the petitioner was the person charged in the indictments. We find, however, that petitioner had the burden of showing beyond a reasonable doubt that she was not the person named in the extradition papers. (Cf. *South Carolina v. Bailey*, 289 U.S. 412, 53 S.Ct. 667, 77 L.Ed. 1292 (1933), where the Supreme Court stated that it could not approve petitioner's discharge unless it appeared from the record that petitioner succeeded in showing by clear and satisfactory evidence that he was outside the demanding state at the time of the alleged crime. "Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the . . . [demanding state] when the . . . offense was committed. . . ." *Id.* at 422, 53 S.Ct. at 671, 77 L.Ed. at 1297.) The record shows that an employee of the bank at which the petitioner allegedly gave a false statement to obtain a credit card testified at the extradition hearing and identified the petitioner as the woman who made the false statement. The petitioner attempted to counter this evidence by testifying that her husband's name was Curtis Dodd, not Richard Williams as the bank's employee had stated. The petitioner also presented several documents establishing the identity of her husband, but her evidence failed to establish beyond a reasonable doubt that she was not the person named in the indictments. Although the trial judge committed error in announcing the standard of evidence he was using, that error inured to the benefit of the petitioner and was not, therefore, prejudicial to her.

[4] We also reject the petitioner's argument that the trial court erred by allowing the testimony of the bank's employee concerning the identity of the petitioner and by failing to conduct a *voir dire* concerning the in-court identification. The extradition hearing, being a summary proceeding, was heard without a jury. A *voir dire* hearing was, therefore, unnecessary. Had the petitioner wanted to attack the identification testimony of the witness, she could have done so adequately on cross-examination. It is obvious from the record that, although the petitioner did attack the identification made by the witness, the trial judge found petitioner to be the one charged in the indictment.

[5] The final argument which we consider is the petitioner's contention that the court erred in not releasing the petitioner when it was clear that the indictments charging Margie L. Williams had

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been amended to read Margie W. Dodd a/k/a Margie L. Williams. Kentucky RCr 6.16 specifically provides for the amendment of an indictment. Furthermore, the courts of Kentucky have held that an amendment to an indictment to correct error in the name of the person charged is a matter of form and not of substance. *Veach v. Commonwealth*, 572 S.W. 2d 417 (1978). We agree with the State that, if the petitioner wants to challenge the constitutionality of the Kentucky procedures allowing for amendment of an indictment, she must do so in the Kentucky courts.

Petitioner presents one additional argument related to the indictment for theft by deception of over \$100.00. Since we are basing our decision only on the question of the indictment charging the crime of making a false statement to obtain a credit card, we find no need to address this contention.

The order of the trial court is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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JOHN A. WHICHARD AND WIFE, CHRISTINE A. WHICHARD; JACK L. WALLACE AND WIFE, JUNE B. WALLACE; RAY T. TUTEN AND WIFE, REBECCA A. TUTEN; LEON H. WINGATE AND WIFE, ALICE A. WINGATE; MAXEY T. BUNCH AND WIFE, NANCY B. BUNCH; EDWARD J. MULLEN AND WIFE, JACQUELINE B. MULLEN; RODNEY T. BOWEN AND WIFE, JEAN E. BOWEN; CONNELL E. PURVIS AND WIFE, JUANITA E. PURVIS; ALTON N. WOOLARD AND WIFE, DARLENE O. WOOLARD; AND CLARENCE M. CARTWRIGHT AND WIFE, BARBARA CARTWRIGHT v. RONALD G. OLIVER AND WIFE, BETTY ORMOND OLIVER

No. 812SC567

(Filed 2 March 1982)

**1. Rules of Civil Procedure §§ 20, 23— proper joinder of parties— all plaintiffs not testifying**

Under G.S. 1A-1, Rule 20(a), permissive joinder, plaintiffs, landowners in a beach development, were entitled to sue collectively defendant landowners without being certified as a class for the purposes of a G.S. 1A-1, Rule 23 class action. Their claims arose out of the same occurrences, and the testimony of some of the plaintiffs, plus the interrogatories and requests for admissions pro-

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vided sufficient evidence as to all the plaintiffs' claims to withstand defendants' motion to dismiss.

**2. Dedication § 1— implied easement by dedication— sufficiency of evidence**

Plaintiff landowners' evidence was sufficient to prove the existence of an implied easement by dedication on the land to which defendants asserted title where the evidence showed that defendants acquired a quitclaim deed to the disputed land for \$100 in 1976; and that defendants' and plaintiffs' deeds specifically refer to one of two recorded maps which designate defendants' property as a park area.

APPEAL by defendants from *Brown, Judge*. Judgment entered 28 December 1980 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 2 February 1982.

All of the parties to this case own lots in Bayview, a beach development in Beaufort County. In 1976, defendants obtained a quitclaim deed to the riverfront lots in dispute and asserted ownership by placing a cable across the property entrance and displaying a "No Trespassing" sign. Plaintiffs assert that the lots in dispute were originally dedicated to the use of all the property owners in the subdivision as a park and water access area, that defendants knew of the easement, and that by being prevented from using the property, plaintiffs have suffered damages. The trial court affirmed the status of the property as having an implied easement by dedication and awarded plaintiffs nominal damages. Defendants appeal. Additional facts will be discussed in the body of the opinion as they relate to the issues raised.

*McMullan & Knott, by Lee E. Knott, Jr., for plaintiff-appellees.*

*Graves & Nifong, by Norman L. Nifong, for defendant-appellants.*

WELLS, Judge.

[1] Defendants first contend that the trial court erred in denying their motion to dismiss the claims of those plaintiffs who did not testify. Defendants argue that since plaintiffs did not bring this action as a Rule 23 class action, there was insufficient evidence to support the claims of the non-testifying plaintiffs.

Plaintiffs were entitled to sue collectively, without being certified as a class for the purposes of a G.S. 1A-1, Rule 23 class ac-



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tion, under the provisions of G.S. 1A-1, Rule 20(a) Permissive Joinder.—

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. . . . Judgment may be given for one or more of the plaintiffs according to their respective rights to relief. . . .

Plaintiffs asserted their rights severally, as individual lot owners, each with the privilege of using land dedicated to owners within Bayview. Their claims arose out of the same occurrences, i.e. defendants' attempted purchase of an interest in and their cordoning-off of the lots, and raised the same factual and legal issue: the existence of a valid easement by dedication versus defendants' right to sole possession and use of the property. The recorded deeds and plats introduced by the testifying plaintiffs are competent, substantive evidence of the ownership and intended use of the disputed land, which support all plaintiffs' claims. See G.S. 8-6; G.S. 8-18; 1 *Stansbury's N.C. Evidence* § 77 (Brandis Rev. 1973); Webster, *Real Estate Law in North Carolina*, § 284(b). Similarly, the testimony of plaintiffs Jack Wallace and John Whichard and adverse witness Betty Oliver, plus the interrogatories and requests for admissions, provided sufficient evidence as to all the plaintiffs' claims to withstand defendants' motion to dismiss. This assignment is overruled.

[2] Defendants' next two exceptions relate to the sufficiency of plaintiffs' evidence in proving the existence of an implied easement by dedication on the land to which defendants assert title. The stipulated evidence shows that this development bordering on the Pamlico River was established between 1922 and 1925 under the name of "Bayside". In 1925, the land was conveyed to The Bayview Company, and its name was changed to "Bayview". In 1926, a map entitled "Bayview on the Pamlico" was recorded, from which lots were conveyed by reference. This plat describes a park-like area along the riverfront, with captions designating a bandstand, pavilion, garden, and hotel. The "park" area on the 1926 map includes the disputed lots. The Bayview Company was placed in receivership in 1932, and then sold to Bayview Incor-

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porated. In approximately 1940, Bayview, Inc. recorded a similar map of the development and sold lots with reference to it. This second map contains markings for a "beech" (sic) at approximately the same location as the "park" on the first map. For a 1976 quitclaim deed to the lot, which includes approximately 50 feet of waterfront on the Pamlico River, defendants paid \$100. Defendants' deed contains a specific reference to the 1940 recorded Bayview, Inc. map. Each of plaintiffs' deeds specifically refers to one of the two recorded maps.

Defendants contend that certain facts tend to negate the property's dedication. Private cottages have been built on areas designated on the plat for the hotel and garden. A boat ramp was built on the disputed lots some years ago, and small fees have been charged for its use. A neighbor's commercial fishing equipment has been stored on the lot from time to time. Defendants assert that when they bought these lots, the boat ramp was in a dangerous state of disrepair, the land was full of litter and was being used as a haven for drunkards rather than a park.

The trial court made the following pertinent findings of fact and conclusions of law.

28. This property is depicted as a park area containing paths and plantings on the map of the Subdivision of Bayview of record in Map Book 1 at page 150 of the Beaufort County Registry.

29. This property is shown and denominated as beach on the map of the Subdivision of Bayview of record in Map Book 2 at page 81 of the Beaufort County Registry.

30. The aforesaid maps represent a division of a tract of land into streets, lots, parks and beaches.

31. The lots owned by the plaintiffs were sold and conveyed by reference to the aforesaid maps.

32. At the time the plaintiffs purchased their lots it was represented to them that the waterfront area shown on the aforesaid maps of the subdivision of Bayview was reserved for the exclusive use of the owners of lots in the subdivision.

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35. The actions of the defendants in placing a cable across a part of the waterfront area shown on the aforesaid maps of the Subdivision of Bayview and erecting "No Trespassing" signs thereon as aforesaid, prevented the plaintiffs from using this area.

. . .

1. When lots are sold and conveyed by reference to a map or plat which represents a division of the tract of land into streets, lots, parks and beaches, a purchaser of a lot or lots acquires the right to have the streets, parks and beaches kept open for his reasonable use.

2. The plaintiffs are entitled to have the waterfront area shown on the maps of the Subdivision of Bayview of record in Book 1 page 150, and in Book 2 at page 81 of the Beaufort County Registry kept open for their reasonable use.

If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even though there may be evidence to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). There was sufficient evidence to support the court's findings, and the trial court's findings support its conclusions of law. As our Supreme Court stated in *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E. 2d 30 (1964):

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. (Citations omitted.) It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. (Citation omitted.) It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. (Citations omitted.) This is true because the existence of the right was an inducement to

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In re Vandiford

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and a part of the consideration for the purchase of the lots. (Citations omitted.) Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated. (Citations omitted.)

*See Finance Corp. v. Langston*, 24 N.C. App. 706, 212 S.E. 2d 176 (1975), *cert. denied*, 287 N.C. 258, 214 S.E. 2d 429 (1975); *Webster*, *supra*, § 284(b). *See also Emanuelson v. Gibbs*, 49 N.C. App. 417, 271 S.E. 2d 557 (1980). We overrule this assignment of error.

Defendants' final contention is that the trial court erred in failing to find as a fact that their property had been adversely possessed under color of title for over seven years, thus destroying the dedication. Adverse possession was not pleaded as a defense nor was the issue raised at trial, and therefore defendants cannot assert this defense on appeal. *Men's Wear v. Harris*, 28 N.C. 153, 220 S.E. 2d 390 (1975), *disc. rev. denied*, 289 N.C. 298, 222 S.E. 2d 703 (1976); G.S. 1A-1, Rule 8(c). This assignment is overruled.

Affirmed.

Judges MARTIN (R. M.) and WEBB concur.

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IN THE MATTER OF: MAMIE TYSON VANDIFORD, WIDOW OF WILLIS HENRY  
VANDIFORD, DECEASED, ROUTE 1, BOX 291-F, GREENVILLE, NORTH CAROLINA

No. 8110IC577

(Filed 2 March 1982)

**Firemen's Pension Act § 1; Master and Servant § 95 — death of firemen — claim for benefits — no appellate review**

G.S. 143-166.4 governs the administration of claims under the death benefit act for firemen and law enforcement officers, G.S. Ch. 143, Art. 12A, and decisions of the Industrial Commission in such proceedings are final and conclusive. Therefore, the Court of Appeals had no jurisdiction to review the decision of the Industrial Commission denying the claim of a fireman's widow for such benefits.

APPEAL by petitioner from the decision and order of the North Carolina Industrial Commission filed 9 March 1981. Heard in the Court of Appeals 3 February 1982.

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In re Vandiford

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This is an appeal from a final decision of the North Carolina Industrial Commission denying claimant's petition for benefits pursuant to article 12A of chapter 143 of the General Statutes of North Carolina, the death benefit act for firemen and law enforcement officers. The evidence indicated that petitioner's husband, a member of the Bell Arthur Fire Department, died as the result of injuries that he received while at the scene of a fire outside the Bell Arthur fire district. The Commission held that the deceased was not performing any official duties within the meaning of N.C.G.S. 143-166.1 at the time he was injured, and, therefore, petitioner was not entitled to benefits under the statute.

*Attorney General Edmisten, by Assistant Attorneys General Ralf F. Haskell and Eliasha H. Bunting, Jr., for appellee.*

*John B. Lewis, Jr. for appellant.*

MARTIN (Harry C.), Judge.

At the threshold, we are faced with the jurisdictional question of appellant's right of appeal in this case. Our research discloses that this is a question of first impression in North Carolina.

The pertinent portion of the statute in question reads:

The Industrial Commission shall have power to make necessary rules and regulations for the administration of the provisions of this Article. It shall be vested with power to make all determinations necessary for the administration of this Article and all of its decisions and determinations shall be final and conclusive and not subject to review or reversal except by the Industrial Commission itself.

N.C. Gen. Stat. § 143-166.4 (1978). This act was passed in 1959. At that time, the following portion of chapter 143 of the General Statutes was in effect:

*Right to judicial review.* — Any person who is aggrieved by a final administrative decision, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute.

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N.C. Gen. Stat. § 143-307 (1964). This statute was passed in 1953 but was repealed in 1973 and reenacted that same year in almost identical language as section 43 of chapter 150A, the Administrative Procedure Act. Proceedings before the North Carolina Industrial Commission are specifically exempted from the provisions of the Administrative Procedure Act. N.C. Gen. Stat. § 150A-1(a)(1978).

Therefore, at the time of the events in question in this case, 5 September 1977, section 143-307 was not in effect, and the Administrative Procedure Act, by its specific terms, did not apply to this proceeding.

There remains, however, the question of the effect of N.C.G.S. 7A-29 upon N.C.G.S. 143-166.4. The part of section 29 necessary for our consideration is: "From any final order or decision of the . . . North Carolina Industrial Commission . . . appeal as of right lies directly to the Court of Appeals." Section 29 was adopted in 1967. Prior thereto, appellate review of Industrial Commission cases had been by appeal to the superior court, with final review in the Supreme Court. N.C. Gen. Stat. § 97-86 (1965). This was the method of appellate review from 1929 to 1967. See § 8081 (ppp) of the North Carolina Code of 1935.

Article 12A of chapter 143, the firemen's benefit act, is not a part of the North Carolina Workers' Compensation Act. The methods of appellate review contained in the compensation act are not applicable to the Industrial Commission's function under article 12A. Although the legislature delegated to the Commission the authority to promulgate the necessary rules and regulations for the administration of claims under article 12A, the statute specifically made the determinations of the Commission final and conclusive and not subject to further review.

Where one statute deals with the subject matter (appellate review) in detail with reference to a particular situation (claims under article 12A) and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation, unless it clearly appears that the legislature intended to make the general act controlling in regard thereto. The fact that the particular statute was later enacted adds additional weight to this rule of construction. *Food Stores v. Board of Alcoholic Control*,

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268 N.C. 624, 151 S.E. 2d 582 (1966); *Utilities Comm. v. Electric Membership Corp.*, 3 N.C. App. 309, 164 S.E. 2d 889 (1968). Here, the 1929 North Carolina Workmen's Compensation Act provided a method of judicial review of determinations by the Industrial Commission. Thereafter, in 1959, article 12A of chapter 143 was passed, with section 166.4 particularly dealing with appellate review of claims under the article. The subsequent adoption of N.C.G.S. 7A-29 did not grant appellate review of determinations by the Industrial Commission; that had already been provided in the 1929 statute. N.C.G.S. 7A-29 merely established a new method of appellate review, occasioned by the creation of the Court of Appeals of North Carolina.

There is no constitutional or inalienable right of appellate or judicial review of an administrative decision. If the statute does not provide for appeal, none exists. *In re Assessment of Sales Tax*, 259 N.C. 589, 131 S.E. 2d 441 (1963); *In re Employment Security Com.*, 234 N.C. 651, 68 S.E. 2d 311 (1951); *Gunter v. Sanford*, 186 N.C. 452, 120 S.E. 41 (1923). There can be no appeal from the decision of an administrative agency except pursuant to specific statutory provision therefor. *In re Employment, supra*.<sup>1</sup> Although the death of Mr. Vandiford is indeed regrettable, the question of whether to provide appellate review of decisions by the Industrial Commission pursuant to N.C.G.S. 143-166.4 is a matter for the legislature, not the courts.

Our holding today is in accord with decisions of the United States Supreme Court. Federal constitutional due process does not require judicial review of final state agency action. *Reetz v. Michigan*, 188 U.S. 505, 47 L.Ed. 563 (1903). Later cases, without referring to *Reetz*, hold that preclusion of judicial review of federal agency action extends only to review of agency decisions applying the statute to a particular set of facts. *Johnson v. Robison*, 415 U.S. 361, 39 L.Ed. 2d 389 (1974). (Petitioner Vandiford is seeking judicial review of such agency decision.) Likewise, federal constitutional due process does not require appellate review of civil and criminal cases. *Abney v. United States*, 431 U.S. 651, 52 L.Ed. 2d 651 (1977); *Estelle v. Dorrough*, 420 U.S. 534, 43 L.Ed. 2d 377 (1975); *Ortwein v. Schwab*, 410 U.S. 656, 35

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1. For a general discussion of judicial review of agency action, see G. Robinson, E. Gellhorn and H. Bruff, *The Administrative Process* 38-42 (2d ed. 1980).

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L.Ed. 2d 572 (1973); *District of Columbia v. Clawans*, 300 U.S. 617, 81 L.Ed. 843 (1936); *Luckenbach S. S. Co. v. United States*, 272 U.S. 533, 71 L.Ed. 394 (1926).

Therefore, we hold that N.C.G.S. 143-166.4 governs the administration of claims under article 12A of the statute, and by its specific terms, the decisions by the Industrial Commission are final and conclusive. Appeal from its decisions is proscribed. It follows that this Court has no jurisdiction to review this appeal of the decision by the North Carolina Industrial Commission made pursuant to N.C. G.S. 143-166.4. The appeal must be dismissed.

Chief Judge MORRIS and Judge VAUGHN concur.

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STATE OF NORTH CAROLINA v. JUNIOR CLAUDE BROWN

No. 8129SC854

(Filed 2 March 1982)

**1. Larceny § 4— larceny by employee—sufficiency of indictment**

In a prosecution for larceny by an employee, an indictment which alleged that cows were delivered to defendant "to be kept to the use of" his employer sufficiently alleged a trust delivery, and it was not necessary for the indictment to allege who delivered the cows to defendant.

**2. Larceny § 4— larceny by employee—age not essential element in indictment**

In a prosecution for larceny by employee, an indictment was not inadequate because it failed to allege that defendant was at least 16 years of age. A proviso in the larceny by employee statute, G.S. 14-74, providing "that nothing contained in this section shall extend to . . . servants within the age of 16 years," withdraws a class of defendants from the crime of larceny by an employee. Because the phrase creates an exception to G.S. 14-74, age is not an essential element which the indictment must allege.

**3. Larceny § 1—distinction between larceny by employee and common law larceny—no fatal variance between indictment and evidence**

There was no fatal variance between an indictment charging defendant with larceny by an employee and the evidence offered at trial where the evidence tended to show defendant was employed as foreman of a farm, was in charge of 100 or so cattle, and wrongfully carried away some of the cattle. The evidence did not prove a common law larceny offense as the evidence did not support the inference that defendant originally wrongfully *acquired* the property.



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APPEAL by defendant from *Freeman, Judge*. Judgment entered 11 March 1981 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 1 February 1982.

Defendant was convicted of felonious larceny by an employee. Judgment imposing a prison sentence was entered.

*Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.*

*Appellate Defender Project for North Carolina, by Assistant Appellate Defender Malcolm R. Hunter, Jr., and Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.*

VAUGHN, Judge.

[1] Three of defendant's assignments of error relate to the indictment for larceny by an employee. Defendant first argues that the indictment is defective because it fails to allege a trust delivery. We overrule this assignment of error.

G.S. 14-74 states the following:

"If any servant or other employee, to whom any money, goods or other chattels . . . by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods, or other chattels . . . with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; . . . the servant so offending shall be punished as a Class H felon: Provided, that nothing contained in this section shall extend to . . . servants within the age of 16 years."

According to *State v. Babb*, 34 N.C. App. 336, 238 S.E. 2d 308 (1977), an indictment charging a violation of G.S. 14-74 must allege that the property was received and held by the defendant in trust, or for the use of the owner, and that being so held, it was feloniously converted or made away with by the servant or agent.

The present indictment alleges that the defendant feloniously carried away two black angus cows which were owned by Royce B. Thomas. It further alleges that

"[a]t the time of this larceny the defendant was the employee of Royce B. Thomas and the said cows had been delivered

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safely to the defendant to be kept to the use of Royce B. Thomas, and the defendant converted them to his own use with the intent to steal them and to defraud his employer, without the consent of his employer. The defendant occupied a position of trust and confidence."

Because the indictment alleges that the cows were delivered to defendant "to be kept to the use of" his employer, we hold the indictment sufficiently alleges a trust delivery. It is not necessary for the indictment to allege who delivered the cows to defendant. See also *State v. Maslin*, 195 N.C. 537, 539, 143 S.E. 3, 5 (1928), *rev'd on other grounds*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Lanier*, 89 N.C. 517, 519 (1883).

[2] Defendant next argues that the indictment is inadequate because it fails to allege that he is at least 16 years old. He cites the statutory phrase, "Provided, that nothing contained in this section shall extend to . . . servants within the age of 16 years." Defendant contends that age is an essential element of G.S. 14-74, which must be alleged, proven and charged. We disagree.

We are aided in our analysis by *State v. Connor*, 142 N.C. 700, 55 S.E. 787 (1906). Addressing a question similar to the present one, the Supreme Court stated:

"It is well established that when a statute creates a substantial criminal offense, the description of the same being complete and definite, and by subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negative in the indictment, nor is proof required to be made in the first instance on the part of the prosecution."

142 N.C. at 701, 55 S.E. at 788.

As noted in *State v. Connor*, *supra*, there are no magic words for creating an exception to an offense. Neither is placement of a phrase controlling. The determinative factor is the nature of the language in question. Is it part of the definition of the crime or does it withdraw a class from the crime?

Upon examining G.S. 14-74, we conclude that the phrase in question *withdraws* a class of defendants from the crime of

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**State v. Brown**

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larceny by an employee. The language before the phrase completely and definitely defines the offense. Servants within 16 years of age are excepted from that definition. Because the phrase creates an exception to G.S. 14-74, we hold that age is not an essential element which the indictment must allege and the State initially prove. *See State v. Connor, supra. Compare with G.S. 14-27.2.*

We recognize that a legislature cannot so define the elements of an offense that defendant has an "unfair" allocation of the burden of proof. *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed. 2d 281, 292 (1977); *State v. Trimble*, 44 N.C. App. 659, 666, 262 S.E. 2d 299, 303 (1980). Age, however, is a fact particularly within defendant's knowledge. To place the burden on defendant to raise the exception to G.S. 14-74 and to prove that he comes within it does not exceed the constitutional limits established. Defendant's assignment of error is overruled.

[3] Defendant's third assignment of error is an alleged fatal variance between the indictment against him and the evidence offered at trial. Defendant was charged with larceny by an employee. He contends, however, that the evidence supported a conviction, if at all, of common law larceny.

Defendant correctly notes a distinction between larceny by an employee and common law larceny. The latter is not a lesser included offense of the former. In fact, a conviction of common law larceny requires evidence inconsistent with that supporting a conviction of larceny by an employee. *State v. Daniels*, 43 N.C. App. 556, 259 S.E. 2d 396 (1979). Common law larceny requires a trespass, either actual or constructive. Larceny by an employee requires *lawful* possession.

Defendant mistakenly equates, however, his actions with the trespass element of common law larceny. Defendant argues that the evidence showed he removed the cows without authority. He contends that he is, therefore, guilty of a wrongful taking and cannot be convicted of G.S. 14-74. The evidence highlighted by defendant, however, shows a wrongful carrying away—an element of both common law larceny and larceny by an employee. The wrongful taking of trespass refers to an originally wrongful *acquisition* of the objects.

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**Evans v. Chipps**

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A case on point is *State v. Lovick*, 42 N.C. App. 577, 257 S.E. 2d 146 (1979). The employees there were employed to bag groceries and sweep. Without permission of their employer, they removed hams from the storeroom. The Court held the employees were properly charged with larceny rather than embezzlement. The evidence showed they had acquired possession of their employer's property illegally.

In contrast is the evidence of the present cause. Defendant's employer testified that defendant was in charge of one hundred or so cattle on Round Pond Farm. According to the manager of Round Pond Farm, defendant was more or less foreman: "He was entrusted with all the cattle there on the farm." This evidence shows that defendant originally had lawful possession of the cows, as required by G.S. 14-74. There is thus no variance between the charge and proof.

Defendant finally argues that the court committed prejudicial error in its admission of hearsay evidence. The argument is without merit for several reasons. Among them, there is nothing to indicate that the witness was not testifying from personal knowledge. If defendant had reason to believe the witness was not speaking from personal knowledge, he was at liberty to explore the issue on cross-examination or *voir dire*. *State v. McKinnon*, --- N.C. App. ---, 283 S.E. 2d 555 (1981).

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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GEORGE REYNOLDS EVANS, SR. v. WILLIAM CHIPPS; CARNEY JAMES;  
DARRYL BRUESTLE AND THE CITY OF WILMINGTON

No. 815SC605

(Filed 2 March 1982)

**1. Constitutional Law § 17; Limitation of Actions § 4.1— actions for violations of civil rights—statute of limitations**

The three-year time limitation prescribed by G.S. 1-52(2) for actions founded on "a liability created by statute, either state or federal" applies to actions under 42 U.S.C. §§ 1983 and 1985(3) to recover damages for deprivation of civil

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**Evans v. Chipps**

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rights under color of State law and for conspiracy to deprive plaintiff of his civil rights.

**2. False Imprisonment § 2; Malicious Prosecution § 7; Trespass § 3— statute of limitations for false imprisonment, malicious prosecution and trespass**

The one-year limitation of G.S. 1-54(3) applies to an action for false imprisonment; the three-year limitation of G.S. 1-52(5) applies to an action for malicious prosecution; and the three-year limitation period of G.S. 1-52(13) applies to an action for trespass by a public officer under color of his office.

**3. Constitutional Law § 17; False Imprisonment § 2; Malicious Prosecution § 7; Trespass § 3— actions barred by statute of limitations**

Plaintiff's actions to recover damages for alleged violation of his civil rights under color of state law, conspiracy to deprive him of his civil rights, false imprisonment, malicious prosecution, and trespass were barred by the statute of limitations, the longest of which was three years, where all of plaintiff's claims arose by 8 August 1977, the date on which he was sentenced to prison and on which he necessarily would have known of the injuries forming the bases of his actions, and plaintiff's complaint was not filed until 27 October 1980.

**4. Limitation of Actions § 11— plaintiff in prison—time to prepare suit—statute of limitations not tolled**

The fact that defendant was in prison and needed time to prepare his complaint did not prevent the statute of limitations from running against his suit to recover damages for alleged violations of his civil rights under color of state law, conspiracy to violate his civil rights, false imprisonment, trespass by a public officer under color of his office, and malicious prosecution.

**5. Limitation of Actions § 12.2; Rules of Civil Procedure § 41 — filing of complaint in federal court—statute of limitations not barred in state court**

G.S. 1A-1, Rule 41(a) did not prohibit claims in state court which had previously been filed in a federal district court from being barred by the statute of limitations where there was nothing in the record to show that the federal court claims were subject to either a voluntary or involuntary dismissal; in entering summary judgment against plaintiff on one claim, the federal court did not specify that plaintiff would have any additional time to file a new action thereon; and plaintiff's complaint in the state court was filed more than a year after the federal district court entered summary judgment against plaintiff. Furthermore, plaintiff's filing of a complaint in federal district court would not prevent the statute of limitations from barring his action in the state court. G.S. 1A-1, Rule 3.

APPEAL by plaintiff from *Rouse, Judge*. Order entered 20 January 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals on 9 February 1982.

This plaintiff was convicted by a jury of armed robbery and larceny, and judgments were entered against him on 8 August

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1977 sentencing him to concurrent prison terms of thirty and two years.

On 27 October 1980, plaintiff instituted this civil action against William Chipps and Carney James, who are officers of the Wilmington Police Department; Darryl Bruestle, who is Chief of Police in Wilmington; and the City of Wilmington. Plaintiff's complaint alleges that defendants violated his civil rights and committed misconduct against him in that defendants Chipps and James arrested plaintiff on 22 April 1977 (for the offenses for which he was convicted) and denied his request for counsel, in that he was held on a criminal charge without having been identified by the victim on the night of arrest, in that perjured testimony and illegal evidence was used against him, in that there was a conspiracy to procure perjured testimony against him, in that a search of plaintiff's residence was conducted for the sole purpose of harassing plaintiff's family, and in that defendants Chipps and James changed police records and tried to destroy evidence exculpating plaintiff of the criminal charges then pending against him and failed to turn over other such exculpatory evidence.

Defendants filed an answer denying the plaintiff's material allegations, pleading the statute of limitations as a bar to the action, and moving for summary judgment. On 20 January 1981, the court entered an order granting defendants' motion for summary judgment, "on the basis of the Statute of Limitations barring the Plaintiff's action." Plaintiff appealed.

*Plaintiff appellant George Reynolds Evans, pro se.*

*Nelson, Smith & Hall, by James L. Nelson; and City Attorney R. Michael Jones, for defendants appellees.*

*Legal Services of the Lower Cape Fear, by James B. Gillespie, Jr., amicus curiae.*

HEDRICK, Judge.

[1, 2] "[I]n determining the applicable statute of limitations, the focus should be upon the nature of the right which has been injured. . . ." *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 241, 259 S.E. 2d 1, 9, *disc. rev. denied*, 298 N.C. 806, 261 S.E. 2d 919 (1979). In the present case, plaintiff's complaint, when considered in a light most favorable to him, alleges injuries to rights which

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arguably would produce the following causes of action: an action under 42 U.S.C. § 1983 for deprivation of civil rights under color of state law; an action under 42 U.S.C. § 1985(3) for conspiracy to deprive another of his civil rights; false imprisonment; malicious prosecution; and trespass. For the actions brought under 42 U.S.C. §§ 1983, 85(3), the applicable limitations period is determined by reference to state law, *Cox v. Stanton*, 529 F. 2d 47 (4th Cir. 1975); that limitations period is three years, which is the time limitation prescribed by G.S. § 1-52(2) for actions founded on "a liability created by statute, either state or federal." See *Bireline v. Seagondollar*, 567 F. 2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842, 62 L.Ed. 2d 54, 100 S.Ct. 83 (1979). Plaintiff's other causes of action, assuming they were adequately alleged, are subject to the following limitations periods: for false imprisonment, one year, G.S. § 1-54(3); for trespass by a public officer under color of his office, three years, G.S. § 1-52(13); and for malicious prosecution, three years, G.S. § 1-52(5).

[3] "Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 214, 171 S.E. 2d 873, 884 (1970). *Bireline v. Seagondollar*, *supra*, however, states that the federal rule fixes the time of accrual of a right of action under the federal civil rights statutes, and that such time of accrual is the point in time when the plaintiff knows or has reason to know of the injury which is the basis of the action. Assuming *arguendo* that all of plaintiff's claims arose on the very late date of 8 August 1977, the date on which he was sentenced to prison and a date on which he would necessarily have to have known of the injuries forming the basis of his action, all of plaintiff's possible causes of action would still be barred by the statute of limitations, since his complaint was not filed until 27 October 1980.

[4] Plaintiff argues, however, that the facts that he was in prison and that he needed time to prepare his suit prevented the statute of limitations from running against his action. This argument is without merit. G.S. § 1-17, which enumerates the disabilities which delay the running of a limitations period, does not include imprisonment; in fact, 1975 N.C. Sess. Laws Ch. 252, effective 1

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January 1976, is entitled "An Act to Amend G.S. 1-17 so as to Eliminate Imprisonment as a Disability Under the Statute of Limitations. . . ." Plaintiff's imprisonment therefore did not prevent the running of the statute of limitations. Similarly, plaintiff cannot avoid the statute of limitations bar by the mere fact that he needed more time to investigate and prepare his case. See *Wheless v. St. Paul Fire and Marine Insurance Co.*, 11 N.C. App. 348, 181 S.E. 2d 144 (1971).

[5] Plaintiff also undertakes to make the argument that his filing of a complaint in United States District Court for the Eastern District of North Carolina on 15 September 1978 and G.S. § 1A-1, Rule 41 prevent a statute of limitations bar to his action. Of the alleged factual grounds for recovery contained in plaintiff's complaint in the present action, only two were contained in plaintiff's federal complaint. Those two pertained to defendants' alleged improper detention of plaintiff without his having been identified by the victim and their alleged deprivation of his right to counsel. With respect to the other claims not mentioned in the federal complaint, but raised in the present case, the federal complaint is wholly irrelevant. With respect to the two claims which were raised in the federal complaint, plaintiff would have us construe G.S. § 1A-1, Rule 41 to save plaintiff from a statute of limitations bar. G.S. § 1A-1, Rule 41(a) provides a plaintiff an additional year to file a new action after a timely action on that same claim is voluntarily dismissed. G.S. § 1A-1, Rule 41(b) likewise provides that a new action may be filed within a year of an involuntary dismissal on a timely first action, if the court so specifies and if the court specifies that the dismissal of the first action was without prejudice. In the present case, there is nothing in the record to show that the two claims which first appeared in plaintiff's federal complaint were subject to either a voluntary or involuntary dismissal; in fact, plaintiff's claim for deprivation of counsel is still pending in federal court; plaintiff's federal court claim of improper detention was subject to a summary judgment in favor of defendants on 23 January 1979, and the court did not specify that plaintiff would have any additional time to file a new action thereon; finally, plaintiff's complaint in the present action was filed more than one year after the federal district court entered summary judgment against plaintiff. Plaintiff's "Rule 41"



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argument is without merit. In addition, it should be noted that a civil action is commenced, in such a manner as to avoid a statute of limitations bar, if, within the period of limitations prescribed, a plaintiff files "a complaint with *the court*," G.S. § 1A-1, Rule 3 [Emphasis added.]; plaintiff's filing of a complaint in federal district court was unavailing to prevent a statute of limitations bar in this action.

When the record discloses that a plaintiff's claims against the defendant are barred by the statute of limitations, the defendant is entitled to judgment as a matter of law and summary judgment is appropriate. *Jarrell v. Samsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376 (1971), *cert. denied*, 280 N.C. 180, 185 S.E. 2d 704 (1972). Summary judgment in the present case was proper.

Affirmed.

Judges HILL and BECTON concur.

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STATE OF NORTH CAROLINA v. KEITH DALE WALKER

No. 8125SC867

(Filed 2 March 1982)

**1. Criminal Law § 50.1— admissibility of opinion testimony by pathologist**

The trial court did not err in allowing a pathologist to testify that fragments found in decedent's body were "small shot that would be the type, a shotgun shell." The testimony was admissible as a shorthand statement of fact.

**2. Constitutional Law § 30— defendant's statement to witnesses—pretrial discovery**

The trial judge did not err in allowing testimony by witnesses for the State concerning statements made by defendants when the State had not disclosed contents of such statements in defendant's discovery motion as G.S. 15A-903(a)(2) only requires the prosecutor to divulge statements made by defendant to persons acting on behalf of the State.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 12 September 1980 in Superior Court, BURKE County. Heard in the Court of Appeals 2 February 1982.

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Defendant was indicted for first degree murder and was convicted of second degree murder. He appeals from a judgment of imprisonment.

*Attorney General Edmisten, by Assistant Attorney General William R. Shenton, for the State.*

*Byrd, Triggs, Mull & Ledford, by Joe K. Byrd Jr., for defendant-appellant.*

HILL, Judge.

The State's evidence tended to show that on 21 June 1980, Randy Norman and his wife had a beer keg party at their house. Defendant was invited and arrived around noon. Robert Taylor Dickerson, the decedent, arrived around 4:30 or 5:00 p.m. Various witnesses testified that they saw or heard decedent arguing with Junior Sprouse and fighting with Jerry Morgan. Decedent was asked to leave the party since he had been causing fights all night. Terry Fleming escorted decedent to his car around 9:30 p.m. As they approached the cars, decedent swung his fist at Fleming but missed. Fleming, in turn, knocked decedent down. As Fleming was turning to go back to the party, defendant came by him. "I heard a blast. I turned around and looked. . . . Dickerson was lying on the ground. Keith was standing there. Keith had a long gun in his hands."

Defendant's evidence tended to show that he talked to decedent's girlfriend and decedent told him, "'well, by God she's with me, you leave her alone or I'll stomp your ass.'" Defendant did not encounter decedent again until he saw decedent fighting with Jerry Morgan. Defendant then decided to get his father's gun, which he had stored in Tony Fleming's truck, and go home. Upon looking for a ride, defendant saw Terry Fleming and another person "arguing, fighting like." Defendant testified that

Terry was knocking him down then, and everything, and Terry started backing off from him, and turned to walk off. As Terry turned to walk off, the boy came up off the ground and started going toward his pocket, going into his pocket, and I shot him. I thought he was coming out with a gun or something to shoot me or Terry.

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[1] In his first argument, defendant contends that the trial judge erred in allowing certain testimony by Dr. John C. Reese, a pathologist, concerning his examination of decedent's wound. Over defendant's objection, Dr. Reese testified that in the wound he found "small fragments of metal and bone and fibra (phonetic-ally) disks and bits of casing-like material," which he described as "portions that we call the gun wadding and shell casing." Again, over defendant's objection, Dr. Reese stated, "My opinion is these are small shot that would be the type, a shotgun shell." Defendant argues that this testimony is opinion evidence "made by an expert witness upon matters that are not within the general scope or realm of his particular knowledge of his discipline," and therefore was erroneously admitted. We do not agree.

It is well established that "a witness may state the 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.' Such statements are usually referred to as shorthand statements of facts." *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975), *modified as to death sentence*, 428 U.S. 904, 96 S.Ct. 3210, 49 L.Ed. 2d 1210 (1976), *quoting State v. Skeen*, 182 N.C. 844, 905, 109 S.E. 71, 72 (1921). *See* 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 125, p. 389; 4 Strong's N.C. Index 3d, Criminal Law § 71, p. 283. Under this rule, our Supreme Court has allowed a police officer's testimony that an article he saw in plain view "'is a burglary lock pick. I am not a locksmith and therefore I couldn't go into details on how it is used but I do recognize it as a burglary lock pick.'" *State v. Craddock*, 272 N.C. 160, 168, 158 S.E. 2d 25, 31 (1967). We find that Dr. Reese's testimony is analogous to that in *Craddock*; it is an admissible shorthand statement of fact. Even so, Dr. Reese "may testify to facts which are within his own personal knowledge, and particularly so with regard to what [he] may have actually seen." *State v. Hudson*, 295 N.C. 427, 433, 245 S.E. 2d 686, 691 (1978). This argument is without merit.

[2] Defendant's second argument alleges that the trial judge erred in allowing testimony by witnesses for the State concerning statements made by defendant when the State had not disclosed the contents of such statements in defendant's discovery motion. G.S. 15A-903(a)(2) requires the prosecutor upon defendant's mo-

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tion, "[t]o divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial." In *State v. Crews*, 296 N.C. 607, 620, 252 S.E. 2d 745, 754 (1979), our Supreme Court interpreted this statute only "to restrict a defendant's discovery of his oral statements to those made by him *to persons acting on behalf of the State*." (Emphasis added.) Defendant's statements to the State's witnesses in the case *sub judice* therefore are not included under G.S. 15A-903(a)(2). See *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979); see generally *State v. Crews*, *supra*.

In his final argument, defendant contends that the trial judge erred in denying his motions to dismiss. On a motion to dismiss,

all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.

*State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977). See also 4 Strong's N.C. Index 3d, Criminal Law § 104, p. 541.

Our review of the evidence, including that which is not detailed here, reveals that each element of second degree murder is evident in the State's case. Defendant's claim of self-defense is not supported by sufficient evidence to compel a dismissal of the charge.

For these reasons, in defendant's trial, we find

No error.

Judges HEDRICK and BECTON concur.

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In re Tate

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IN THE MATTER OF: DEBRA TATE, A JUVENILE

No. 8117DC969

(Filed 2 March 1982)

**Infants § 16— juvenile petition—failure of intake counselor to confer with juvenile or guardian**

The trial court erred in failing to dismiss a juvenile petition for failure of the intake counselor to confer with either the juvenile or her guardian before the petition was issued as required by G.S. 7A-532(2).

Judge WEBB dissenting.

APPEAL by the juvenile from *Clark, Judge*. Judgment entered 17 July 1981 in District Court, SURRY County. Heard in the Court of Appeals 11 February 1982.

On 30 June 1981, a juvenile complaint was made by Bill Gwyn against 13-year-old Debra Tate, alleging that she repeatedly telephoned the home of Bill Gwyn, for the purpose of harassing Mr. and Mrs. Bill Gwyn and their son Tommy Gwyn. Linda Chaney, intake counselor for Surry County, approved the petition on 30 June 1981. The trial court found the juvenile delinquent and placed her on probation until her 18th birthday. The juvenile appealed.

Mr. Gwyn's complaint against Debra Tate stems from certain telephone calls made to his home by the juvenile. The State's evidence tended to show that Debra Tate and Tommy Gwyn had dated for several months, but were no longer dating at the time of the phone calls. Mr. Bill Gwyn had told Miss Tate not to call his house, and had placed a tracer on his phone line in June 1981. The juvenile called the Gwyn home approximately four times during the nineteen day period that the tracer was in operation and each time the juvenile just asked to speak to Tommy. The phone call on 29 June 1981 prompted Mr. Gwyn's complaint. The juvenile lives with her grandmother.

*Attorney General Edmisten by Assistant Attorney General W. Dale Talbert for the State.*

*Woltz, Lewis & LaPrade by Thomas W. Anderson for the juvenile-appellant.*

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In re Tate

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MARTIN (Robert M.), Judge.

The juvenile-appellant first contends that the trial court erred in failing to dismiss the petition for failure of the intake counselor to confer with either the juvenile or her guardian as required by N.C. Gen. Stat. § 7A-532(2). We agree.

At the time of the delinquency hearing for this juvenile, N.C. Gen. Stat. § 7A-532, part of the new Juvenile Code that went into effect 1 January 1980, read as follows:

Upon a finding of legal sufficiency, except in the nondivertible offenses set out in G.S. 7A-531, the intake counselor shall determine whether a complaint should be filed as a petition, the juvenile diverted to a community resource, or the case resolved without further action. He shall consider criteria which shall be provided by the Administrator of Juvenile Services in making his decision. The intake process shall include the following steps:

- (1) Interviews with the complainant and the victim if someone other than the complainant;
- (2) *Interviews with the juvenile, his parent, guardian, or custodian;*
- (3) Interviews with persons known to have information about the juvenile or family which information is pertinent to the case.

Interviews required by this section shall be conducted in person unless it is necessary to conduct them by telephone. (Emphasis added.)

Under the Code, certain procedures in screening the petition that were left to the counselor's discretion under the prior Code, became mandatory. The former Code merely instructed the intake counselor to be guided by the "best interests of the juvenile" in gathering evidence and making a decision on whether to file a petition, while the new Code requires the counselor to interview the complainant, the victim, the juvenile, his parents or custodian, and any other person who has information about the case before a petition is issued. Note, Family Law, 58 N.C.L. Rev. 1471 (1980).

In this case, Linda Chaney, the juvenile's intake counselor, testified that she "did not talk to either the juvenile or her grand-

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**In re Tate**

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mother [the guardian] before issuing the petition" and that she approved the issuance of the petition after talking with Jack Moore, the juvenile's probation officer. Jack Moore testified that he "did not talk to the respondent or her grandmother on June 29, 1981 or on June 30, 1981, the day the petition was issued." Further, the juvenile's testimony was not sufficient to support a finding that Jack Moore interviewed her before the petition was issued. She testified: "I don't think I talked to Jack Moore or Linda Chaney on June 29, 1981 about the charge . . . I talked to Jack Moore on the telephone about the charge. It was after the 29th of June. I don't think it was after the 30th of June. I don't know if it was on the 30th of June."

The trial court made no finding of fact about any discussion between the juvenile or her grandmother, and Ms. Chaney or Mr. Moore. Because the evidence in this case could not support a finding that the counselor complied with N.C. Gen. Stat. § 7A-532(2), as it read in June 1981, the trial court erred in finding the juvenile to be delinquent.

Because this assignment of error is determinative of this appeal, we need not consider the juvenile's remaining assignments of error.

Reversed.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority because I believe the evidence shows there was substantial compliance with G.S. 7A-532 before the juvenile petition was filed. The evidence shows the juvenile had called the home of Bill Gwyn, the complaining witness, on several occasions before 29 June 1981 and that Mr. Gwyn had told the juvenile to stop calling his home. Jack Moore, a juvenile officer, talked to Mr. Gwyn and the juvenile in regard to the calls. Mr. Moore discussed these conversations with Linda Chaney, the juvenile officer who approved the petition on 30 June 1981. I believe this was substantial compliance with G.S. 7A-532.

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I also believe the evidence was sufficient to find the juvenile was delinquent. Mr. Gwyn testified that the juvenile and his son had "dated for approximately four or five months" but were no longer doing so and that they "had some problems and Debbie has had Tommy brought to court." I believe that with this background, the telephone calls to Mr. Gwyn's residence were harassing calls after Mr. Gwyn had told the juvenile to stop calling his residence.

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MARIE BOWERS WILLIS v. EARL T. BOWERS

No. 814DC635

(Filed 2 March 1982)

**Divorce and Alimony § 24.8— modification of child support order not supported by evidence**

An order increasing child support payments by defendant to plaintiff from \$75 per month to \$380 per month was not supported by the findings. There was no finding of plaintiff's original child-oriented expenses, no finding that the needs of the children had increased other than the unsupported finding that the children were older and thus their needs had escalated, no finding as to defendant's expenses and no consideration was given to his ability to pay. Further, a finding that plaintiff's earning capacity had been reduced to nothing was not supported by the evidence.

APPEAL by defendant from *Martin, Judge*. Judgment entered 17 February 1981 in District Court, ONSLOW County. Heard in the Court of Appeals 11 February 1982.

Plaintiff and defendant were divorced on 11 August 1971 in Florida, and their divorce decree incorporated a separation agreement whereby defendant agreed to pay \$75.00 per month for each of his two children until they attained the age of 21 and alimony of \$150.00 per month to his wife until she remarried.

On 22 July 1980 plaintiff filed a complaint seeking from defendant increased support in the amount of \$450.00 per month per child, their dental and medical expenses in excess of military benefits and plaintiff's attorneys fees. The trial court ordered the defendant to pay \$380.00 per month for each child's support and to pay any hospital, medical and dental expenses in excess of military benefits.



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*Earl C. Collins for the plaintiff-appellee.*

*Brumbaugh and Donley by Clay A. Brumbaugh for the defendant-appellant.*

MARTIN (Robert M.), Judge.

The conclusions of law in the order of the trial court entered 17 February 1981 read in pertinent part as follows:

10. That there has been a substantial change in circumstances with respect to the financial position of both Plaintiff and Defendant and the needs of the children since the original Judgment for support in 1971.

11. That since 1971, Defendant's pay and allowances have increased by some \$1,500 per month, and Plaintiff's earning capacity has been reduced to nothing. In the nine years since 1971, both children have grown into teenagers with a commensurate increase in their physical, social and educational needs.

12. That the \$75.00 per month per child support ordered by the Court in 1971 for the minor children's support is inadequate to provide for their basic necessities in 1981 and later years.

The defendant's contention that there was no evidence and no finding of a "change in circumstances" must be sustained. N.C. Gen. Stat. § 50-13.7(a) provides that in order for a court to modify a support order, a change in circumstances must be shown. The only evidence presented by plaintiff and found by the court is that the children have grown into teenagers, that the defendant's income has increased, and the evidence also included a list of the expenses of the plaintiff's entire five-person household. There was no finding of the plaintiff's original child-oriented expenses and no finding that the needs of the children had increased other than the unsupported finding that the children were older and thus their needs had escalated. No finding was made as to defendant's expenses regarding his present family and no consideration was given to his ability to pay, apart from his gross salary. *See Waller v. Waller*, 20 N.C. App. 710, 202 S.E. 2d 791 (1974).

The court found that plaintiff's earning capacity had been reduced to nothing. This finding, however, is not supported by

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the evidence. Evidence of plaintiff's ability or inability to work was offered in this testimony of plaintiff:

I started working immediately after the separation and worked until I moved here to Jacksonville. Six or seven months prior to moving to Jacksonville, I was in an accident which may have resulted in my leg being 5/8ths inch shorter than the other and which causes me pain when I have to sit for long periods of time. It is very uncomfortable for me to sit at a desk. Because of this I quit my employment just before moving to Jacksonville and I have not been employed since moving here. I tried to get a job at the hospital in April but the pay they offered made it uneconomical for me to take it. . . .

I worked at my old job until January 19, 1980. I arrived here on January 20, 1980. Prior to arriving we purchased a house in both our names. The children are not on the title of the house. My present husband and I were married on July 12, 1980.

This testimony indicates that plaintiff was able to work for six or seven months following her accident, that she stopped working the day before she moved to North Carolina, and that she had considered working in North Carolina but found the salary offered too low. Normally the amount a father should pay for the support of his children is a matter for the trial judge's determination, reviewable only in case of an abuse of discretion. *Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649 (1967). Here, however, the exercise of such discretion was based in part on a material finding of fact not supported by the evidence. We cannot say that this erroneous finding did not affect the actions of the trial judge when he increased the defendant's monthly payments. *Allen v. Allen*, 7 N.C. App. 555, 173 S.E. 2d 10 (1970). In fact, the remainder of the findings of fact was not sufficient to establish a change in circumstances.

The evidence presented in this case did not support a finding that the plaintiff had no earning capacity. The remainder of the findings of fact did not support the court's conclusion that a substantial change in circumstances justified an increase in defendant's monthly child support payments. The order appealed

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from is vacated and this case is remanded for further proceedings in accordance with this decision.

Vacated and remanded.

Judges WEBB and WELLS concur.

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GREAT WEST CASUALTY COMPANY v. C. W. FLETCHER D/B/A FLETCHER  
TRUCKING COMPANY

No. 815DC578

(Filed 2 March 1982)

**1. Constitutional Law § 26— foreign judgment—joint and several liability—full faith and credit**

Under full faith and credit, our courts are bound by a foreign judgment finding plaintiff and defendant jointly and severally liable. Art. IV, § 1 of the U.S. Constitution.

**2. Courts § 21.5— right to contribution—law of place of tort**

The right of one tort-feasor to obtain contribution from another tort-feasor is a substantive right and hence is governed by the law of the place of the tort.

**3. Judgments § 36.3; Torts § 3.1— joint tort-feasors—foreign judgment—effect in action for contribution**

Under the law of Tennessee which was applied in this case, a judgment entered pursuant to a trial on the merits against two or more tort-feasor defendants invokes a res judicata effect as to rights existing between the several tort-feasor defendants in a subsequent action for contribution.

APPEAL by defendant from *Lambeth, Judge*. Judgment filed 19 February 1981 in District Court, NEW HANOVER County. Heard in the Court of Appeals 3 February 1982.

This action was instituted by plaintiff against defendant for contribution of one-half of a Tennessee judgment rendered jointly against plaintiff and defendant, which judgment was fully satisfied by plaintiff. Defendant denied liability and defended on the basis that plaintiff's insured and defendant were operating trucking companies in interstate commerce; that the provisions of the Interstate Commerce Act controlled liability; and that by its

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terms the Act requires a lease agreement which would impose liability solely on plaintiff's insured.

Trial was held without a jury. The court gave the Tennessee judgment full faith and credit and ordered that the plaintiff recover of the defendant the sum of \$4,779.50, representing one-half the amount of the judgment, plus interest. Defendant appeals.

*Crossley & Johnson, by Robert W. Johnson, for plaintiff appellee.*

*Algernon L. Butler, Jr. for defendant appellant.*

MARTIN (Harry C.), Judge.

[1, 2] Under full faith and credit, our courts are bound by the Tennessee judgment finding plaintiff and defendant jointly and severally liable. U.S. Const. art. IV, § 1. Moreover, as a general rule, the right of one tort-feasor to obtain contribution from another tort-feasor is a substantive right and hence is governed by the law of the place of the tort. *See* 18 Am. Jur. 2d Contribution § 44 (1965). The choice of law rule of North Carolina adheres to this general principle. *See Tatham v. Hoke*, 469 F. Supp. 914 (W.D.N.C. 1979). Thus the law of Tennessee governs the disposition of the case.

The issues raised by defendant with respect to the effect of the lease agreement on his liability were raised and fully litigated before the Tennessee courts and decided against defendant. *Heron v. Fletcher*, 503 S.W. 2d 84 (Tenn. 1973). Moreover, defendant in the North Carolina case failed to present at trial, and has failed to include in the record on appeal, a copy of the lease agreement purportedly relieving him of financial liability under the Tennessee judgment.

Tennessee has adopted the Uniform Contribution Among Tort-Feasors Act. Tenn. Code Ann. § 29-11-101 to -106.

The following provisions of the statute are pertinent to our determination.

29-11-103. Determination of pro rata shares.—In determining the pro rata shares of tort-feasors in the entire liability:

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(1) Their relative degrees of fault shall not be considered;

(2) If equity requires, the collective liability of some as a group shall constitute a single share; and

(3) Principles of equity applicable to contribution generally shall apply.

29-11-104. Enforcement of contribution—Procedure—Limitation

. . . .

(f) The judgment of a court in determining the liability of the several defendants to a claimant for an injury or wrongful death after trial on the merits, shall be binding among such defendants in determining their right to contribution or indemnity . . .

[3] It thus appears that under Tennessee law where there has been a trial on the merits against two or more tort-feasor defendants, the judgment in such case invokes a *res judicata* effect as to rights existing between the several tort-feasor defendants in a subsequent action for contribution. *See Bible and Godwin Const. Co., Inc. v. Faener Corp.*, 504 S.W. 2d 370 (Tenn. 1974); *Watts v. Memphis Transit Management Co.*, 224 Tenn. 721, 462 S.W. 2d 495 (1971). In *Watts*, the court was asked to construe T.C.A. § 29-11-104(f) (formerly T.C.A. § 23-3104(f)) and in doing so cited as authority the Official Commissioner's Note of the Commission on Uniform Laws:

"Subsection (f) *Res Adjudicata*. This seems necessary in view of the position some courts have taken that adjudication of liability to the plaintiff of several defendants is not necessarily *res adjudicata* of the liability for determination of contribution claims. Obviously the defendants should be bound as among themselves by the adjudication of their liability to the claimant."

*Id.* at 725-26, 462 S.W. 2d at 497.

Unless inequitable, the pro rata share of each defendant is determined by dividing the amount of the judgment by the number of persons against whom it has been obtained. In the case sub judice plaintiff and defendant were adjudged jointly liable in

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the Tennessee action. Plaintiff has paid the full amount of the judgment and is entitled to contribution for the amount it paid in excess of its pro rata share; that is, one-half.

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

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BETTY LANKFORD, EMPLOYEE PLAINTIFF v. DACOTAH COTTON MILLS,  
EMPLOYER AND INDIANA LUMBERMENS MUTUAL INSURANCE COM-  
PANY, CARRIER DEFENDANTS

No. 8110IC471

(Filed 2 March 1982)

**1. Master and Servant § 96.5— workers' compensation—findings supported by evidence**

In a workers' compensation action in which plaintiff alleged a back injury she received was a result of an accident in the course of her employment, the Commission's finding that plaintiff's injury did not arise by accident because the testimony of the plaintiff was not credible was supported by competent evidence and therefore could not be disturbed on appeal.

**2. Master and Servant §§ 87.2, 95— motion for new trial after notice of appeal—neither motion nor ruling part of the record**

Where plaintiff filed a motion for a new trial with the Industrial Commission after notice of appeal to an appellate court was entered, and neither the motion nor the Commission's ruling was made a part of the record on appeal, and a motion for a new trial based on newly discovered evidence was not made in the appellate court, the appellate court was unable to entertain or consider the plaintiff's motion.

APPEAL by plaintiff from the Opinion and Award of the Industrial Commission entered 13 January 1981. Heard in the Court of Appeals 6 January 1982.

This case involves a back injury sustained by plaintiff on 27 February 1979, while employed as a weaver in defendant's cotton mill. Plaintiff's evidence tended to show that as she pulled a loom handle in the normal course of her employment, the handle jerked her toward the loom causing an injury to her back. The defendant's evidence consists primarily of the testimony of a represen-

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tative of defendant's insurance carrier. He testified that plaintiff did not mention to him being jerked into the machine by the machine's loom handle and that she told him that she sustained her injury while standing on her tiptoes, leaning forward with both arms extended in order to tie in the loose ends at the top of her machine.

The Deputy Commissioner found that plaintiff sustained an injury arising out of and in the course of her employment. However, the Deputy Commissioner found, as a matter of law, that plaintiff's injury did not arise by accident, because the testimony of the plaintiff was not credible. The Full Commission, in a split decision, sustained the opinion and award of the Deputy Commissioner that plaintiff's injury was not compensable under the Worker's Compensation Act because it was not the result of an accident as contemplated by N.C. Gen. Stat. § 97-2(6).

*Ketner and Rankin by David B. Post, for the plaintiff-appellant.*

*Brinkley, Walser, McGirt, Miller & Smith by G. Thompson Miller, for the defendant-appellee.*

MARTIN (Robert M.), Judge.

[1] We first will consider plaintiff's second, third and fourth assignments of error which in effect question whether the Industrial Commission's findings of fact and conclusions of law were supported by competent evidence. In this case, Deputy Commissioner Shuping doubted the credibility of plaintiff's testimony that the loom handle jerked her injuring her back. Plaintiff had given a prior inconsistent statement to Tom Veal, the insurance adjuster, which statement indicated that plaintiff's injury occurred while she was performing her normal and routine job duties.

In *Blalock v. Roberts Co.*, 12 N.C. App. 499, 504, 183 S.E. 2d 827, 830 (1971), Judge Hedrick, speaking for the Court stated:

The findings of fact of the Industrial Commission are conclusive and binding on appeal if supported by competent evidence in the record even though the record contains evidence which would support a contrary finding. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968). The

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Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; it may accept or reject all of the testimony of a witness; it may accept a part and reject a part. *Robbins v. Nicholson*, 10 N.C. App. 421, 179 S.E. 2d 183 (1971); *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968); *Ander-son v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). The Commission has the duty and authority to resolve conflicts in the testimony of a witness or witnesses. If the findings made by the Commission are supported by competent evidence they must be accepted as final truth. *Rooks v. Cement Co.*, 9 N.C. App. 57, 175 S.E. 2d 324 (1970); *Petty v. Associated Transport*, 4 N.C. App. 361, 167 S.E. 2d 38 (1969).

In this case, the Deputy Commissioner's findings are supported by competent evidence and therefore cannot be disturbed by this Court. Plaintiff's assignments of error are without merit and are overruled.

[2] Plaintiff bases the remainder of her brief on a motion for a new trial which she filed with the Industrial Commission after notice of appeal to this Court was entered. Neither this motion nor the Commission's ruling thereon was made a part of the record on appeal. More importantly, she did not make a motion for a new trial based on newly discovered evidence in *this Court*. Therefore, we are unable to entertain or consider her motion.

It is well-settled in North Carolina that when an appeal for compensation under the provisions of the Worker's Compensation Act has been duly docketed in the Superior Court [now the Court of Appeals], upon an appeal from an award of the Industrial Commission, the Superior Court [now the Court of Appeals] "has the power in a proper case to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission." *Byrd v. Lumber Co.*, 207 N.C. 253, 255, 176 S.E. 572, 573 (1934); *McCulloh v. Catawba College*, 266 N.C. 513, 146 S.E. 2d 467 (1966). In this case, however, we have no motion for a rehearing before us. However well-founded plaintiff's motion might be, we cannot consider it.

For the foregoing reasons, the judgment of the Industrial Commission is



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In re Whicker v. High Point Schools

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Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

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IN THE MATTER OF: PANSY H. WHICKER, CLAIMANT-APPELLANT v. HIGH  
POINT PUBLIC SCHOOLS, EMPLOYER AND EMPLOYMENT SECURITY  
COMMISSION OF NORTH CAROLINA

No. 8121SC640

(Filed 2 March 1982)

**Master and Servant § 108— disqualification for unemployment compensation**

A determination by the Employment Security Commission that claimant is disqualified for unemployment compensation benefits because she left work voluntarily without good cause attributable to her employer was supported by evidence and findings that on 30 August 1979 claimant submitted to her superior a letter stating "please accept my resignation effective June 30, 1980"; this was accepted by her employer; on 18 December 1979 claimant advised respondent employer that she wished to rescind her resignation; claimant did not file another job application with respondent employer; and claimant was aware that respondent employer was considering other individuals to fill the vacancy created by her resignation.

APPEAL by claimant from *Mills, Judge*. Judgment entered 4 March 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 February 1982.

Claimant appeals from a judgment of the Superior Court affirming a decision by the Employment Security Commission that claimant is disqualified for unemployment compensation benefits because she left work voluntarily without good cause attributable to her employer.

*Allman, Humphreys and Armentrout, by James W. Armentrout, for claimant appellant.*

*No brief filed by respondent-appellee, High Point Public Schools, Employer.*

*C. Coleman Billingsley, Jr., Staff Attorney, for respondent-appellee, Employment Security Commission of North Carolina.*

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In re Whicker v. High Point Schools

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WHICHARD, Judge.

Claimant was employed by respondent-employer, High Point Public Schools. On 28 August 1979 she was called into a conference with the associate superintendent and a personnel office employee. On 30 August 1979 she submitted to the associate superintendent a letter stating "please accept my resignation effective June 30, 1980."

On 18 December 1979 claimant advised the superintendent that she wished to rescind her resignation. He told her she could not, and that respondent-employer "had already made other arrangements." At that time respondent-employer had discussed the position with several individuals and "had made tentative commitments."

Claimant testified: "Nobody ever asked for my resignation, either impliedly or expressly . . . . There was no pressure applied to me in any way." She also testified that she was told at the 28 August 1979 conference "to make copies of everything" she sent to the associate superintendent, and that he would make copies of everything he sent to her; that the associate superintendent indicated that this was "for [her] own protection"; and that she did interpret this as pressure.

The Employment Security Commission found as facts that claimant gave a resignation to her superior indicating her intent to resign; that this was accepted by her employer; that she then, in December, 1979, made known to the superintendent her interest in continuing employment; that she did not file another job application with respondent-employer; and that she was aware that respondent-employer was considering other individuals to fill the vacancy. These findings are supported by competent evidence in the record, and are thus conclusive on appeal. *Yelverton v. Furniture Industries*, 51 N.C. App. 215, 218, 275 S.E. 2d 553, 555 (1981), and authorities cited.

The question is whether these findings sustain the Commission's conclusion that claimant was disqualified from receiving unemployment compensation benefits by virtue of G.S. 96-14, which provides, in pertinent part, as follows:

An individual shall be disqualified for benefits:

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**In re Whicker v. High Point Schools**

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(1). . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer.

G.S. 96-14 (Supp. 1981). "The claimant has the burden of proving that [s]he is not so disqualified." *In re Vinson*, 42 N.C. App. 28, 30, 255 S.E. 2d 644, 646 (1979). *See also Employment Security Com. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950); *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544 (1941).

We find nothing in the record to merit a conclusion that claimant has sustained her burden of proving that she was other than "unemployed because [s]he left work voluntarily without good cause attributable to the employer." G.S. 96-14(1) (Supp. 1981). We agree with the Commission that "[t]he fact that the claimant later wished to rescind her resignation does not negate the fact that it was voluntarily offered . . . ." The Superior Court thus properly found that the facts found by the Commission were based upon competent evidence in the record, that the Commission properly applied the law to those facts, and that the Commission's decision should be affirmed.

The judgment of the Superior Court is therefore

Affirmed.

Judges CLARK and ARNOLD concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 FEBRUARY 1982

BENTON v. DANIEL CONSTRUCTION No. 8110IC480	Industrial Commission (H-3535)	Affirmed
BOYD v. BOYD No. 8130DC600	Haywood (80CVD151)	Appeal Dismissed
BRANTLEY v. BRANTLEY No. 8118DC481	Guilford (79CVD6889)	Affirmed
CULLEN v. CULLEN No. 8110DC583	Wake (80CVD6428)	Appeal Dismissed
HOPPER v. HOPPER No. 8117DC630	Stokes (80CVD182)	Dismissed
STATE v. BROOKS & MERCER No. 8116SC746	Robeson (80CRS20010) (80CRS20011)	No Error, Judgments Vacated & Remanded For Resentencing
STATE v. CRISP No. 8126SC847	Mecklenburg (80CRS83341)	No Error
STATE v. EVANS No. 8126SC669	Mecklenburg (80CRS27176)	No Error
STATE v. EVANS No. 8110SC830	Wake (78CRS56789) (78CRS56790)	No Error
STATE v. FERGUSON No. 8127SC882	Gaston (80CRS22783) (80CRS22784)	No Error
STATE v. JENKINS No. 8119SC772	Cabarrus (80CRS17415)	No Error
STATE v. JOHNSON No. 815SC779	New Hanover (80CRS25212) (80CRS25213) (80CRS25214) (80CRS25437)	No Error
STATE v. MCGIRT No. 815SC912	New Hanover (80CRS24076)	No Error
STATE v. MACKEY No. 8126SC585	Mecklenburg (80CRS077723) (80CRS077725) (80CRS077726)	Affirmed

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STATE v. MOORE No. 8129SC729	Henderson (80CR08212)	No Error
STATE v. MORRISON No. 8112SC751	Cumberland (80CRS45863)	No Error (d)
STATE v. PERRILL No. 8116SC823	Robeson (79CRS26414)	No Error
STATE v. POLLOCK No. 818SC786	Wayne (80CR4310)	Vacated & Remanded
STATE v. REID No. 8121SC860	Forsyth (80CRS45008) (80CRS50018)	No Error
STATE v. REYNOLDS No. 8114SC677	Durham (80CRS14403)	No Error
STATE v. SAWYER No. 811SC732	Pasquotank (80CRS4327)	No Error
STATE v. SENTELLE No. 8125SC898	Caldwell (80CRS9839)	No Error
STATE v. TALLEY No. 8128SC951	Buncombe (80CRS28474)	No Error
STATE v. WALKER No. 8114SC857	Durham (80CRS14589)	No Error
STATE v. WILLARD No. 8121SC735	Forsyth (80CRS31681)	No Error
SUMMERS v. SUMMERS No. 8110DC509	Wake (76CVD685)	Affirmed

## FILED 2 MARCH 1982

CLIFTON v. CLIFTON No. 8110DC512	Wake (80CVD8067)	Appeal Dismissed
HUDSON v. DOWNS No. 812SC395	Beaufort (78SP58)	Affirmed
IN RE OWENS No. 8121DC871	Forsyth (79J204)	Reversed
LYNCH v. ALAMANCE No. 8110IC613	Industrial Commission (TA-6881)	Vacated & Remanded
MORETZ v. HOYLE No. 8111SC595	Lee (79CVS0708)	Affirmed
PARTON V. WALTERS No. 8129SC521	Rutherford (79CVS463)	Affirmed

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PLEASANT v. JOHNSON No. 8114SC606	Durham (81CVS0038)	Reversed
ROBINSON v. ROBINSON No. 8128DC633	Buncombe (80-9)	Affirmed
STATE v. ARMSTRONG No. 812SC850	Tyrrell (79CRS605B)	No Error
STATE v. BOWEN No. 8129SC959	Henderson (80CRS9119)	No Error
STATE v. DAVE No. 8127SC952	Gaston (79CRS10962) (79CRS10971)	Affirmed
STATE v. GALLOWAY No. 8117SC742	Rockingham (75CR4303)	No Error
STATE v. HAMMONDS No. 8116SC913	Robeson (80CRS23710) (80CRS23711)	No Error
STATE v. HUDSON No. 8120SC908	Richmond (80CRS3667) (80CRS3675) (80CRS3676)	No Error
STATE v. KORNEGAY No. 818SC653	Wayne (80CRS18464)	No Error
STATE v. KIRBY No. 8118SC877	Guilford (80CRS9350)	No Error
STATE v. MOORE No. 8129SC851	Rutherford (80CRS3683)	No Error
STATE v. STEELE No. 8126SC964	Mecklenburg (80CRS81862)	No Error

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**STATE OF NORTH CAROLINA v. ALVIN EUGENE JONES**

No. 8114SC824

(Filed 16 March 1982)

**1. Criminal Law § 52— expert testimony based on personal knowledge—hypothetical questions not necessary**

A firearms identification expert could properly give testimony comparing the velocities and characteristics of weapons and ammunition without the use of hypothetical questions since the testimony was based on the expert's own personal knowledge.

**2. Criminal Law §§ 42.4, 42.6— chain of custody of rifle—connection of articles with crime**

The State did not fail to establish the chain of custody of a rifle between the time of an alleged murder and when it was turned over to the State by defense counsel three days later since the remote possibility that the rifle was switched while in the possession of defendant's attorney was ruled out by testimony of a firearms identification expert who positively determined that two of the cartridges found at the crime scene had been fired from that particular rifle. Furthermore, the State sufficiently established that the rifle, a bullet found in the victim's body, and cartridge cases found at the crime scene were involved in the incident in question for their admission into evidence.

**3. Homicide § 21.7— second degree murder—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of second degree murder where there was substantial evidence tending to show that defendant fired the shot which caused decedent's death, notwithstanding there was some evidence that another man was also firing a pistol at decedent.

**4. Homicide § 19.1— self-defense—character of deceased as violent person—defendant's knowledge of acts**

The trial court in a homicide case did not err in the exclusion of testimony by defendant's wife tending to show the character of the deceased as being that of a dangerous and violent person where there was no evidence that the particular acts of violence by decedent about which defendant's wife attempted to testify were known to the defendant.

**5. Criminal Law § 117.2— instruction on credibility of witnesses**

The trial court's instruction that if the jury believed the testimony of an interested witness in whole or in part, "then you should treat what you believe the same as you would treat other believable evidence" did not invade the province of the jury to assign different weight and importance to the testimony of the various witnesses.

**6. Homicide § 28— instructions on "without justification or excuse"**

The trial court's confusing instructions on "without justification or excuse" were not prejudicial where the trial court thereafter properly charged that a killing would be excused entirely on the ground of self-defense if certain circumstances existed.

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**7. Homicide § 23.1— instructions on inferring intent**

The trial court's instruction that "one arrives at the intent of another person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom" did not allow the jury to infer defendant's intent from circumstances without requiring the jury to find the circumstances specifically and was proper.

**8. Homicide § 24.1— instructions on presumptions of unlawfulness and malice**

The trial court's instructions in a second degree murder case did not set forth mandatory presumptions of unlawfulness and malice from a shooting found to be intentional. Furthermore, there was no merit to defendant's contention that presumptions of unlawfulness and malice are not constitutionally acceptable where there is evidence of self-defense.

**9. Homicide § 28.3— self-defense—instruction on aggression or provocation by defendant**

The trial court's instruction in a homicide case that if defendant voluntarily and without any provocation entered into the fight, "he making the first move," then he would be the aggressor unless he thereafter attempted to abandon the fight and gave notice to the victim that he was doing so was not erroneous.

**10. Criminal Law § 118— instructions—use of "convictions" rather than "contentions"**

Defendant was not prejudiced by the court's instruction that it was the duty of the jury to remember and consider the "convictions" urged by counsel in their arguments rather than the "contentions" of counsel.

APPEAL by defendant from *Herring, Judge*. Judgment entered 13 March 1981, in Superior Court, DURHAM County. Heard in the Court of Appeals 13 January 1982.

Defendant was indicted and tried for the second degree murder of Courtney D. Rorie. At trial, the State's evidence tended to show that, sometime in September 1980, Courtney Rorie returned from Florida to Durham where his estranged wife, Gracey Rorie, had recently died. On 26 September, he was with his brother William Rorie and his nephew Timothy Rorie at 319 Chadwick Road where Gracey Rorie had lived. While the three men were in the house searching for Gracey Rorie's Social Security number, defendant drove up in a white car and parked behind William Rorie's truck. Defendant asked Timothy Rorie if William were there, and William emerged from the house to talk to defendant. When he did, defendant demanded to know what the men were doing there. When Courtney Rorie came out of the house, defendant moved to the back, left door of his car, pulled out a rifle, and began to fire at him. At this point, both Timothy



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and William Rorie saw Courtney Rorie run around the front end of the truck and open the right door to the truck. As defendant fired toward the truck, William Rorie watched as his brother was shot in the face through the back window. When defendant moved to the right side of his car and continued firing, Courtney Rorie got up and began to run. Timothy Rorie saw his uncle grab his body, and he saw blood on the back of his t-shirt.

Meanwhile, William Rorie had thought of his shotgun in his truck and had retrieved it. He tried to fire at defendant, but defendant ducked down beside his car. As the two men see-sawed back and forth, defendant hollered out, "Larry, get him from that side." At that point, William Rorie did not see his brother but he did see two or three people at the corner of the house. Fearing for his own safety, William Rorie ran around the house, and Timothy Rorie let him in the back door. Defendant returned to his car and quickly drove away.

The State's evidence also consisted of testimony by a next door neighbor Willie Mae Tinnen who observed the fracas from her home. When she first heard shots, she ran to the front door and saw a man named "James" at the corner of the driveway. When she realized he had a pistol and was shooting at someone, Tinnen opened the door, looked out, and saw Courtney Rorie sitting down in front of the truck. To Tinnen, Rorie appeared to have a shotgun or rifle, but he did not appear to be firing it. A few minutes later, Tinnen observed James go back across the front yard, get into a cream colored car which had just driven up and ride away. Defendant was in his car just behind the cream colored car.

Courtney Rorie was found dead in the woods behind 325 Chadwick. The forensic pathologist testified that Rorie had three gunshot entrance wounds in his body. One was in the lip; the second was in the right back with an exit wound in the left chest; and the third was in the chest. In the pathologist's opinion, Courtney Rorie died as a result of extensive internal bleeding because of the gunshot wounds he received. The two major wounds were the ones to the chest and back, both of which were potentially lethal. The pathologist, Dr. Eric Mitchell, concluded that Rorie died as a result of the wound in the back due to the fact that it caused more rapid bleeding. Under cross-examination, Dr. Mitch-

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ell stated that he thought the wound in the back was caused by a bullet fired from a rifle.

The defendant presented evidence tending to show that he was married to the sister of Gracey Rorie and that, prior to 26 September 1980, defendant had observed Courtney Rorie fight with several people, including defendant's sister-in-law. Defendant was aware of Rorie's reputation within his community as that of a violent and dangerous fighting man. He also knew that Rorie had been convicted of manslaughter.

On 26 September, defendant went to 319 Chadwick, the home of his deceased sister-in-law after talking to a cousin of Gracey Rorie. The cousin had told defendant that Courtney Rorie had called earlier to say that he was going to 319 Chadwick to get some of the furniture from the house. Defendant agreed to drop by the house and find out what was going on.

After he arrived at the house, he asked Timothy Rorie to tell William Rorie to come out. While the two men were talking, the front door of the house flew open and Courtney Rorie raced from the house. Defendant panicked when he saw Rorie leap from the porch. He reached into his car, picked up his rifle and clipped it. Rorie ran around the front of the truck, opened the door, and appeared to be getting something from behind the seat. Thinking that Rorie was getting a gun and that defendant could not get out of the driveway safely, defendant shot at the back window of the truck. When Rorie squatted down, defendant fired again. Then Rorie ran to the back of the house. At this time, defendant realized that William Rorie had a gun, and the two of them tried to line up good shots against one another. Although defendant could not tell if William Rorie shot at him or not, he did hear at least three shots from, he thought, the rear of the house. Defendant saw a cream colored car and, thinking it was a sheriff's car and hoping to scare William, he hollered, "He's around back." When William ran to the back of the house, defendant fled.

By its verdict, the jury found the defendant guilty of second degree murder. From judgment imposing imprisonment for a term of two to twenty years, defendant appealed.

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*Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.*

*Loflin & Loflin, by Thomas F. Loflin III, for defendant-appellant.*

ARNOLD, Judge.

[1] Defendant brings forward eleven assignments of error for our consideration. First, he contends that the trial court erred in permitting the State to ask the firearms identification expert the following two questions:

Q. If you have a .22 caliber pistol and a .22 caliber rifle, both using the same type, the same type of manufactured ammunition, both being fired from the same distance at the same target, what consequence would be the greater velocity that you testified the rifle would have, what consequence would that have in terms of striking the target?

. . . .

Q. Would you tell the jury, please, how the characteristics of .25 caliber ammunition compare with that of .22 caliber long rifle ammunition?

One of defendant's arguments about these questions is that they were hypothetical questions requiring the State to incorporate into the questions relevant facts in evidence in the case. We disagree with this contention.

Under well-established law in our jurisdiction, an expert witness may be permitted to render his opinion based on facts not within the expert's personal knowledge. 1 *Stansbury's North Carolina Evidence* § 136 (Brandis Rev. 1973). If the expert is basing his opinion on facts not within his personal knowledge, the facts upon which he grounds his opinion must be set before the jury in a proper manner, leaving to the jury the duty to find the facts. *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967). If the facts upon which the expert bases his opinion are within his own knowledge, he may be permitted to state positively his opinion on the matter. 1 *Stansbury's*, *supra* § 136.

In the present case, we find that the two questions were based on the expert's own personal knowledge and that a hypo-

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thetical question was not necessary. The State did not ask the witness' opinion as to who fired the shot which was fatal to Courtney Rorie; nor did it ask his opinion as to what type of gun fired the fatal shot. In either of these cases, a hypothetical question incorporating facts the jury might find would have been necessary. As the questions were posed, however, the expert witness had only to compare velocities and characteristics of weapons and ammunition, a comparison based solely on his own expert knowledge.

Defendant argues further that these two questions were improper because there was no evidence to support the State's inference that the pistol used by "James" was of a .22 or .25 caliber type. From the evidence as it is set forth in the record, the identity of "James" as well as of the type of pistol he used were unknown. While we agree with the defendant that the State apparently wanted the jury to find that James' pistol was of a .22 or .25 caliber type and was, because of the distance of "James" from Courtney Rorie, less likely to have caused the fatal wound, we cannot hold this to be error. The defendant had every opportunity on cross-examination to emphasize the fact that the caliber of "James'" pistol was unknown, that there was a possibility that its caliber was much higher, and that a pistol of higher caliber might have caused the fatal wound.

Defendant next assigns as error the trial court's admission into evidence of nine exhibits (Numbers 3, 4, 16, 17 and 18-22), including the rifle obtained from defendant's counsel, the only bullet found in the victim's body, and cartridge cases found in the driveway at 319 Chadwick Road. Defendant's contention that these items were not relevant is absurd and is rejected. The test, which is clearly met in this case, is that real evidence is relevant if it sheds any light on the circumstances of the crime. *See 1 Stansbury's, supra*, § 118.

[2] Furthermore, we reject defendant's argument that the State failed to establish chain of custody of the rifle between the time of the alleged murder and 29 September, three days later, when it was turned over to the State by defense counsel. The remote possibility that the rifle was switched while in the possession of defendant's attorney was ruled out by the testimony of the firearms identification expert who positively determined that two of the cartridges found in the driveway of 319 Chadwick Road had been fired from that particular rifle.

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Defendant's further contention concerning the introduction of real evidence is that the State failed to establish that the items introduced into evidence were involved in the incident giving rise to the trial.

In *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977), the Supreme Court noted that there are no simple standards for determining whether an object offered in evidence has been adequately identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. As a result, the trial judge must exercise sound discretion in determining the standard of certainty required to show that the item offered into evidence is the same as that involved in the incident. *Id.* In the case before us, we find that the trial court did exercise sound discretion in allowing the State to introduce the several items of real evidence.

The record reveals that the evidence was held under lock and key by the Property Officer of the Durham Police Department. He checked the items out twice, once to his supervisor, the firearms identification expert, and once to a laboratory technician. Both of these men testified. Michael Jennings, the laboratory technician, identified the fired cartridges (Exhibits 18-22), the small lead particles (Exhibit 16), and the bullet (Exhibit 17) from the victim's body as the ones either found at the scene of the shooting or retrieved from the medical examiner. Curtis, the firearms expert, positively identified the rifle (Exhibit 3), and cartridges and a cartridge case (Exhibit 4). Furthermore, Louis Danford, formerly of the Durham County Sheriff's Department, testified that the rifle (Exhibit 3) introduced into evidence was the one he received from defendant's counsel and that, further, the nine live rounds of ammunition (Exhibit 4) were removed from that rifle. Based on the foregoing, we find no merit to defendant's contention that the State failed to identify these objects as being connected to the incident.

[3] As his third assignment of error, defendant contends that the trial court erred in failing to dismiss the case at the close of the State's evidence and at the close of all of the evidence and in denying defendant's motion to set aside the jury verdict. The basis of all three of defendant's motions was that there was insufficient evidence to support his conviction for any degree of homicide.

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Upon a motion to dismiss in a criminal action, all of the evidence favorable to the State must be deemed true; discrepancies and contradictions therein are disregarded, and the State is entitled to every favorable inference of fact reasonably deduced from the evidence. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). Based on this principle, this Court can find no error in the trial court's denials of defendant's motion. A reading of the facts set forth in this opinion shows that there was substantial evidence from which a jury might conclude that the defendant fired the shot which caused Rorie's death. The fact that there was some evidence that another man was firing a pistol at the deceased does not negate, for purposes of defendant's motions, the evidence implicating defendant.

[4] Defendant's fourth assignment of error pertains to the exclusion of certain evidence he sought to introduce in order to show the character of the deceased as being that of a dangerous and violent person. The excluded evidence, elicited from Rachel Jones, defendant's wife, was to the effect that Courtney Rorie, at some point in the past, had shot up the window of Rachel Jones' house and, when she had attempted to go call the sheriff, the deceased had driven up behind her and had shot the tires of her automobile; that Rorie had once gone into Gracey Rorie's house and destroyed many of its furnishings; that, upon Rorie's return to Durham, he threatened to remove all the furniture from the house; that defendant's wife and others in her family had gone to a lawyer and then to law enforcement officials, including a district court judge, to stop Rorie's threatened efforts; and that a warrant for Rorie's arrest on earlier charges had been drawn.

In a prosecution for homicide or for assault and battery, where there is evidence tending to raise the issue of self-defense, evidence of the character of the deceased as a violent and dangerous fighting man is admissible if (1) such character was known to the accused or (2) the evidence is wholly circumstantial or the nature of the event is in doubt. 1 *Stansbury's, supra*, § 106. In the instant case, we are concerned only with the question of whether the particular acts of Courtney Rorie's violence, related by Rachel Jones, were known to the defendant. While it is hard to find that defendant did not know of some of the incidents about which his wife attempted to testify, we must, after studying the record, so conclude. Rachel Jones did not testify that defendant

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knew of Rorie's destruction of furniture or of his shooting out the window of her house and the tires of her car; defendant was apparently not among the family members who sought legal help and was, as far as the record reveals, unaware of those efforts. Most importantly, defendant, who took the stand in his own behalf, failed to testify to the very incidents about which his wife sought to testify. We cannot hold it error that the trial court refused to admit this testimony concerning the victim.

There was testimony elicited from Rachel Jones which would have confirmed defendant's testimony concerning Rorie's violent and dangerous character. This testimony, however, was merely cumulative, and its exclusion was not erroneous.

Defendant's fifth assignment of error is related to additional evidence concerning Rorie's violent and dangerous character. Defendant contends that the trial court erred in refusing to admit documents from the divorce file of Gracey and Courtney Rorie. The record shows that the file contained a Complaint for a Divorce from Bed and Board and Motion for Temporary Restraining Order; Gracey Rorie's Affidavit to bring action as a pauper; Certificate of Counsel in support of the affidavit; an Order allowing Gracey Rorie to proceed *in forma pauperis*; an Order to Show Cause; a Temporary Restraining Order; Courtney Rorie's handwritten answer; a civil summons; an Order granting, among other things, a divorce from bed and board; a Motion for Contempt; and an Order for the arrest of Rorie.

Obviously many of these documents were not relevant to defendant's cause. Once the objection to their admission was sustained, defendant should have reoffered the unobjectionable parts. See *Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395 (1965). This he failed to do. Furthermore, it does not appear from the record that defendant was aware of the incidents of Rorie's violence which were related in the documents. Hence, the documents were not admissible to show Courtney Rorie's character as a violent and dangerous man. 1 *Stansbury's, supra*.

[5] As his sixth assignment of error, defendant contends that the trial court erred in charging the jury on how to determine the credibility of witnesses interested in the outcome of the trial. The record reveals that the trial court charged the jury as follows:

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Now, you may find that a witness or witnesses are interested in the outcome of the trial and in deciding whether or not to believe such a witness then you should take into account the interest that he or she may have, and [if after doing so you believe that testimony in whole or in part, then you should treat what you believe the same as you would treat other believable evidence.]

**DEFENDANT'S EXCEPTION NO. 13**

We do not believe, as defendant contends, that this instruction invaded the province of the jury to assign different weight and importance to the testimony of the various witnesses. Prior to this instruction the court had charged:

You are also the sole judges of the weight to be given any of the evidence presented, and by this I mean, if you decide certain evidence is believable you must then determine the importance of that evidence in light of all the other believable evidence presented during the trial.

In reviewing this as well as the charge about which defendant complains, we can find no error in this portion of the charge.

[6] Next defendant assigns as error the following instructions concerning second degree murder:

I instruct you, Members of the Jury, that in order for you to find this defendant guilty of second degree murder and in order for the State to prevail in that, the State must prove two things beyond a reasonable doubt, which are

[First, that this defendant, Alvin Eugene Jones, on or about the 26th day of September, 1980, intentionally and without justification or excuse, such as while acting in self-defense, and with malice shot Courtney Rorie with a deadly weapon.]

**EXCEPTION NO. 14**

. . . .

I have used the word malice . . . [in saying that] the acts must be done with malice. I instruct you that malice means not only hatred or ill will or spite, as it is ordinarily



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understood, that, of course, is malice. [but the word malice also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death, without just cause, excuse or justification, such as, through acting in self-defense.]

## EXCEPTION NO. 16

Additionally, the trial court, in redefining second degree murder, included the following instruction:

First, that the defendant intentionally and without justification or excuse and with malice shot Courtney Rorie with a deadly weapon. [When I use the term without justification or excuse I'm referring to self-defense or the doctrine of self-defense.]

## DEFENDANT'S EXCEPTION NO. 20

Defendant contends that, by these confusing instructions, the court charged that acting in self-defense would be an intentional shooting without justification or excuse. While we concede that, according to the court reporter's punctuation, the instructions were not well stated, we find, in view of the rest of the charge, that defendant suffered no prejudicial error.

The law in North Carolina is well-established that, although it may not be necessary to kill to avoid death or great bodily harm, a person may kill if he believes it to be necessary, and he has reasonable grounds for believing it necessary, to save himself from death or great bodily harm. *State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249 (1971). The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the defendant at the time of the killing. *Id.*

In the instant case, in addition to the charge set forth above, the trial court clearly stated that a killing would be excused entirely on the ground of self-defense if certain circumstances existed. Given these instructions, we conclude that error, if any, in this portion of the charge was not prejudicial to defendant.

[7] Defendant's eighth assignment of error pertains to another exception he took to the jury charge. He contends that the follow-

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ing original instruction, repeated when the judge redefined second degree murder, allowed the jury to infer defendant's intent from circumstances without requiring the jury to find the circumstances specifically:

Now, I have said that the act must have been intentional. Intent is the exercise of an intelligent will. Intent is a condition or emotion of the mind which is seldom, if ever, capable of direct proof, but the intent of a person is usually deduced from the acts, the declarations, and circumstances known to the person charged with having that intent. [One arrives at the intent of another person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.]

**EXCEPTION NO. 15**

We can find no merit in defendant's contention. It is certainly within the province of the jury to determine what the circumstances of the killing were; as the charge reflects, once the jury has done this, it must make reasonable deductions of defendant's intent from those circumstances. The jurors are not required to agree on all the circumstances; different persons may reasonably deduce intent from slightly variant circumstances. In overruling this assignment of error, we note that the *North Carolina Pattern Jury Instructions* contain this instruction on intent almost verbatim. *North Carolina Pattern Jury Instructions for Criminal Cases*, § 206.30.

[8] As his next assignment of error, defendant contends that the trial court erred in instructing the jury on the inference it might draw if it found beyond a reasonable doubt that defendant intentionally inflicted the fatal wound upon Courtney Rorie. The trial court charged:

Now, if the State proves beyond a reasonable doubt that the defendant intentionally killed Courtney Rorie with a deadly weapon or that he intentionally inflicted a wound upon him with a deadly weapon that proximately caused his death, then you may infer first, that the killing was unlawful, and second, that the killing was done with malice, but you are not compelled to draw such an inference. You may consider this along with all the other facts and circumstances in

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determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, then the defendant would be guilty of second degree murder, nothing else appearing.

Defendant's argument is that, because self-defense was an issue in the case, the trial court should have instructed about the permissibility of the inferences of unlawfulness and malice with reference to the evidence about self-defense. Defendant asserts that neither inference could be drawn until the jury determined beyond a reasonable doubt that the defendant did not act in self-defense.

In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue is properly presented in a homicide case. Thereafter, in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), rev'd. on other grounds, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977), our Supreme Court held that the requirement that a criminal defendant prove that he acted in self-defense violated the Due Process Clause. As the Court interpreted the *Mullaney* ruling, our courts are not precluded from utilizing traditional presumptions of malice and unlawfulness.

It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional [Citations omitted]. Neither, by reason of *Mullaney*, is it unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of a deadly weapon).

*Id.* at 649, 220 S.E. 2d at 588.

Citing these cases, defendant argues that the trial court's instructions set forth mandatory presumptions of unlawfulness and malice and that where, as here, there was evidence of self-defense, such presumptions were not constitutionally acceptable. We disagree with the defendant's argument.

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First, the presumptions of unlawfulness and malice were not mandatory. The jurors were told that they were not compelled to draw such inferences and that they could consider the inference along with other facts and circumstances in determining whether the killing was done unlawfully and with malice. Secondly, the trial court had already instructed the jury that, in order to find defendant guilty of second degree murder, it had to find that he had intentionally, *without justification or excuse such as self-defense*, shot Rorie with a deadly weapon. Finally, the trial court, in instructing on the issue of self-defense, clearly placed on the State the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. When we read the instructions as a whole, we can find no violation of the *Mullaney* and *Hankerson* principles.

Defendant also asserts that, when self-defense is at issue in a case, the presumption of malice and unlawfulness from a shooting found to be intentional is inconsistent with due process of law. The reason for this, according to defendant, is that the presumption violates the "more likely than not" standard:

[A] criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

*Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed. 2d 57, 82 (1969). We reject defendant's argument that the presumptions of malice and unlawfulness are not "more likely than not" to flow from proof of an intentional shooting. *Leary*, which held unconstitutional a statutory presumption that one in possession of marijuana had knowledge that the substance was imported into this country, does not apply. Defendant's ninth assignment of error is overruled.

[9] Defendant's tenth assignment of error is based on the exception he took to the following instructions on the third aspect of the doctrine of self-defense:

And the third thing is that the defendant was not the aggressor in the incident. If he voluntarily and without any provocation entered into the fight, [he making the first move.]

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## EXCEPTION NO. 18

then he would the aggressor unless he thereafter attempted to abandon the fight and gave notice to Courtney Rorie that he was doing so.

Contrary to defendant's contentions, we do not find that this instruction confused the jury as to this aspect of the law of self-defense. The right of self-defense is available only to one who is without fault. If a person voluntarily, *i.e.* aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he abandons the fight, withdraws from it, and gives notice to his adversary that he has done so. *State v. Davis*, 225 N.C. 117, 33 S.E. 2d 623 (1945). We find that the instructions set forth adequately reflect the law on this matter.

[10] Defendant's final contention is that the trial court erred when it instructed the jurors that it was their duty to remember and consider the *convictions* urged by counsel in their arguments. The trial court obviously committed a minor *lapsus linguae* when it referred to "convictions" instead of "contentions." In view of the rest of the charge concerning the jury's duty to remember and consider all the evidence and in view of the fact that the *lapsus linguae* affected equally the prosecution and defense, we find no error.

Having reviewed the record of defendant's trial and the contentions he has brought forward, this Court finds that defendant received a fair trial, free from prejudicial error.

No error.

Judges CLARK and WHICHARD concur.

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**STATE OF NORTH CAROLINA v. BRUCE GILBERT HAGEMAN**

No. 8121SC920

(Filed 16 March 1982)

**1. Receiving Stolen Goods § 5.1— sufficiency of evidence**

The evidence was sufficient to go to the jury in a prosecution for receiving stolen goods where the jury could determine from what a witness told defendant that defendant had reasonable grounds to believe that a ring was stolen and that, in purchasing the ring from the witness, defendant had the intent necessary to constitute the crime of receiving stolen goods.

**2. Criminal Law § 128— failure to set aside verdict—discretionary**

A trial court's decision concerning whether or not to set aside verdicts involves the exercise of the court's discretion, is not a question of law and is not, therefore, reviewable.

**3. Criminal Law § 7; Receiving Stolen Goods § 7— entrapment—insufficient evidence**

Defendant's motions to dismiss and to set aside the verdict on grounds of entrapment were properly denied where there was no evidence of an on-going relationship of trust or of repeated requests for defendant to perform illicit activity, and where, at the request of the police who had reason to suspect defendant's purchase of stolen goods, a witness for the State approached defendant once concerning the purchase of a jade ring and, a short while later, concerning the purchase of silverware. There was no evidence that the defendant was induced to commit a crime not contemplated by him, and there was, therefore, no entrapment as a matter of law.

**4. Criminal Law § 112.4— refusal to instruct on law of circumstantial evidence—no error**

There was insufficient circumstantial evidence relevant to defendant's guilt or innocence to require the trial judge, upon request, to instruct on the law of circumstantial evidence.

**5. Criminal Law § 121— instructions on entrapment proper**

In a prosecution for receiving stolen goods, the instructions concerning entrapment were sufficient on the concept that, when entrapment is an issue, the question of defendant's willingness, or predisposition to commit the crime is raised, even though the word "predisposition" was not used. Further, the State is not required to prove beyond a reasonable doubt that there was no entrapment.

**6. Receiving Stolen Goods § 1.1— stolen goods intercepted by police—character of goods changed—attempting to receive stolen goods verdict proper**

Where defendant was indicted for receiving stolen goods and, from the evidence presented, the jury could have found beyond a reasonable doubt (1) that silver was stolen pursuant to a breaking and entering, (2) that the police took possession of the silver but returned it to the person responsible for

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stealing the silver for him to take to defendant, and (3) that defendant, with reasonable grounds to believe the silver had been feloniously stolen or taken, purchased it from that person, defendant could have been convicted of attempting to receive stolen goods. Even though the stolen goods were actually intercepted and taken in by police and such interception changed the character of the goods so that no receipt of stolen goods was possible, the defendant nevertheless could have been convicted of attempting to receive stolen goods. G.S. § 15-170.

**7. Receiving Stolen Goods § 1.2— attempt to receive stolen goods misdemeanor**

An attempt to receive stolen goods is a misdemeanor, not a felony, therefore, a conviction for felonious attempt to receive stolen goods cannot stand.

Judge BECTON dissenting in part and concurring in part.

APPEAL by defendant from *Mills, Judge*. Judgments entered 2 April 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 9 February 1982.

Defendant was charged in Case Number 80CR51100 with the misdemeanor receipt of stolen goods, a jade ring. After conviction and judgment in Forsyth County district court, he appealed to superior court. The trial of the misdemeanor case was consolidated with trial for defendant's indictment on a felony charge (Case Number 80CR52198) with receiving stolen goods, sterling silver flatware, after having reasonable grounds to believe that said property had been stolen pursuant to a breaking and entering and larceny.

At trial, the State's evidence tended to show that, on or about 5 December 1980, Stephon Johnson and Tyrone Oliver broke into the home of Elizabeth Prince and stole silverware, rings, and jewelry. Some of the stolen goods, including a watch, were sold at the Metal Mart, owned by defendant. While attempting to sell more of the stolen merchandise in Greensboro, Johnson and Oliver were arrested. The Winston-Salem Police Department took possession of the sterling silver flatware.

While out of jail on bond, Johnson returned to defendant's Metal Mart where he attempted to obtain money to get Oliver out of jail. Defendant stated that he had no money. On 18 December, Johnson returned to the Winston-Salem Police Department where he tried to turn in a jade ring which had also been taken from Mrs. Prince's home. The police refused to accept the

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ring, but they worked out an agreement with Johnson whereby Johnson, wired with a transmitter and microphone, would return to the Metal Mart to sell the ring and the silver to defendant. Johnson testified that, when he sold the ring to defendant, he informed the defendant that it was "hot." The tape recording showed the following conversation:

MR. JOHNSON: Hey man, what 'cha been up to?

MR. HAGEMAN: Not much, how about you? Sticking in there?

MR. JOHNSON: Well, I'll let you know. Check it out man, I got a ring, man, it ain't got no kind of identification. I mean, no kind of signs on it. One that you know, I went back and found that one. I lost a lot of stuff man, when I was trying to get away, you know.

MR. HAGEMAN: Okay.

MR. JOHNSON: But that was still there. I got some silver if you want it, man.

. . .

MR. JOHNSON: . . . Well, I've got some silver, man, but I just don't want the police bothering me, you know how they is.

MR. HAGEMAN: Oh, sure.

MR. JOHNSON: Yeah, it's hot.

MR. HAGEMAN: Man, I don't know, I'd rather not.

MR. JOHNSON: Check it out, check it out. I mean it's marked sterling, it ain't got nobody's initials on it.

MR. HAGEMAN: Yeah, but still man, the police are sly people, man I—

MR. JOHNSON: They won't know nothing, man, they won't know nothing.

MR. HAGEMAN: Didn't you sell some pocket watches?

MR. JOHNSON: Yeah.



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MR. HAGEMAN: They caught a friend?

MR. JOHNSON: They did, they caught a friend, they still got him, they got him in Greensboro.

MR. HAGEMAN: He hasn't fessed up to it or anything?

. . .

MR. JOHNSON: I've been doing all right for the last—soon as I got out of jail, man, but I got to go to court next week, cause my lawyer says as long as they didn't catch us with nothing we're scot-free.

MR. HAGEMAN: Right.

MR. JOHNSON: So we're scot-free.

MR. HAGEMAN: Right, well, that's good, that's good, man. It's not worth the hassle, I mean I hope for you you don't ever get caught.

MR. JOHNSON: Hey, I'm gonna be all right, you know, I'll be all right, you know, I'm gonna still—Winston-Salem.

MR. HAGEMAN: You're all right, you're okay. Well, all right, you've got \$10.

MR. JOHNSON: Look, I give you a false name this time, you gotta—

MR. HAGEMAN: Don't tell me that.

. . .

MR. JOHNSON: . . . I'm gonna bring the silver back, is that all right?

MR. HAGEMAN: Well—

MR. JOHNSON: They ain't gonna catch up with that silver, man.

MR. HAGEMAN: I don't know, it's—I just feel funny.

MR. JOHNSON: Hey, you can get rid of it, right?

MR. HAGEMAN: You got a friend, don't ya? Send him on in.

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MR. JOHNSON: All right, if I can find him.

Upon Johnson's return with the silver, the taped conversation continued in pertinent part:

MR. HAGEMAN: What ya got?

MR. JOHNSON: I got some silver.

MR. HAGEMAN: Okay, let me weigh it up.

MR. JOHNSON: This be where I broke in the house and took it.

MR. HAGEMAN: Oh, don't tell me nothing.

MR. JOHNSON: Okay, this is where I broke in a house so you gotta watch out, right?

MR. HAGEMAN: Right.

. . . .

MR. JOHNSON: When I broke in the house, there's some that I hid. I got another box. I gotta a friend gonna bring it. I can get another friend to bring it a little bit more at a time if you want it that way. I just gotta make sure it cools down. All of it's silver, man. I sold some to your man up there yesterday.

MR. HAGEMAN: Where? Here?

MR. JOHNSON: Right up there. You're not the only person I know.

MR. HAGEMAN: Yeah.

MR. JOHNSON: I know a whole lot of um, you know. All of it's silver, man.

MR. HAGEMAN: Man, I got a kind of funny feeling now, I don't know.

MR. JOHNSON: You'll be all right, man, you'll be all right.

. . . .

MR. HAGEMAN: Well, I'm gonna have to check a few of those pieces too. These here are no good. . . .

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MR. JOHNSON: Well, I might could take them probably somewhere else and sell um, that ain't no good, might be try to get over on somebody, go find a dummy, ya know.

MR. HAGEMAN: Yeah, there's a lot of dummies out there.

. . .

MR. JOHNSON: . . . You didn't write my name down last time, did ya?

MR. HAGEMAN: No, we got rid of that ticket.

MR. JOHNSON: All right. You don't know me and I don't know you.

MR. HAGEMAN: Hey, that's it, man, and if you ever come back here and you're caught, I don't know you, understand?

MR. JOHNSON: Right. You ain't gonna call the police on me soon as I leave, are you?

MR. HAGEMAN: No, cause I know too much already.

MR. JOHNSON: On who, me?

MR. HAGEMAN: No, I mean I know too much, in other words, you know, if I buy it I can get—but even if I call the police down here, they'll still say, well, Mr. Hageman, you gave him some money.

MR. JOHNSON: Right, right, so you can't do nothing. They'll get you for buying stolen goods. But they won't know it's stolen, man, just go on and do what you did with the watches, you know the watches and stuff, do them like you did the watches and it will be all right. In about exactly 45 minutes I got a guy coming down here, you want him to bring the whole box or just a little bit at a time? I can get another guy to come too.

MR. HAGEMAN: Well, I don't want to know who they are, okay?

MR. JOHNSON: You ain't got to know who they are, they just gonna walk in here, show them to you and it's just like me and you, you know?

MR. HAGEMAN: Right.

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MR. JOHNSON: Oh, I got—you ain't waiting on no police, are you?

MR. HAGEMAN: No, man, I'm just worried, that's all.

MR. JOHNSON: You all right, you all right cause where I broke in the place, man, the lady dropped the charges . . . then didn't show up in court yesterday. Know what I mean? She dropped the charges. She didn't need all that back. All she wanted was her insurance, that's all.

MR. HAGEMAN: Hey, I got a lot of friends at the police force and man, if this ever got out.

MR. JOHNSON: They don't know nothing, man.

. . .

Defendant paid Johnson for the silverware and, shortly after Johnson left defendant's store, the police entered and arrested the defendant.

The defendant offered evidence tending to show that he attended church regularly and that he had a good character and reputation within his community. Taking the stand on his own behalf, defendant testified that he did not recall that Johnson told him the jade ring was stolen and that initially he did not believe Johnson when he told him the silverware was "hot." After Johnson's first trip during which defendant bought the jade ring, defendant called the "hot line," a police telephone number on which police would read a list of items that had recently been stolen. Defendant asked Officer Reaves, who was operating the line to tell him of items stolen within the past 12 to 24 hours. The list did not contain descriptions of the watches, the ring, or the silver defendant was to buy. Defendant requested that Reaves call him to give him details on some other items Reaves had mentioned. Before Johnson returned with the silver, Reaves returned defendant's call to say that he had no further details. Defendant stated to Reaves that he, the defendant, might have to call him later if someone came in with some silver. In explaining the incriminating statements heard on the tape, defendant testified that he was confused and frightened and that he made the statements to gain Johnson's confidence.

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The State offered rebuttal evidence by Officer Reaves who corroborated defendant's testimony about the "hot line" calls but who further testified that defendant did not inform him that he had purchased a jade ring from a man claiming to have stolen it. Reaves also stated that at no time did the defendant refer to Johnson's statements about stolen silver or to defendant's fear for his safety and need for police protection.

In Case Number 80CR51100, the jury found defendant guilty of attempted non-felonious receiving of stolen goods, and in Case Number 80CR52198, it found him guilty of attempted felonious receiving of stolen goods. From judgments imposing consecutive prison terms, defendant appealed.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.*

*William B. Gibson for defendant appellant.*

HEDRICK, Judge.

By his first four assignments of error, defendant argues that the trial court erred in denying his motions for dismissal of the charges, for nonsuit, and for setting aside the verdicts. As to the motions to dismiss and the motion for nonsuit, defendant contends that there was insufficient evidence (a) that he had reasonable grounds to believe the ring to have been stolen at the time he bought it and (b) that he acted with a dishonest purpose in receiving either the ring or the silverware. On the question of setting aside the verdict, defendant contends that the verdict was against the greater weight of the evidence concerning the elements set forth in (a) and (b) above. We reject defendant's contentions.

[1] Upon the motion to dismiss and its equivalent motion to grant a nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be deemed true; discrepancies and contradictions therein are disregarded, and the State is entitled to every favorable inference of fact reasonably deduced from the evidence. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). In reviewing the record in the present case, we find that the evidence was clearly sufficient to take the case to the jury. Viewing the evidence in the light most favorable to the State, we believe the jury could determine from

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what Johnson told defendant that defendant had reasonable grounds to believe that the ring was stolen and that, in purchasing the ring, defendant had the intent necessary to constitute the crime. Johnson stated that he had a ring with "no kind of identification." He said, "I mean, no kind of signs on it. One that you know, I went back and found that one. I lost a lot of stuff man, when I was trying to get away, you know." Furthermore, Johnson talked extensively about the silver he had stolen thereby giving the defendant additional grounds to be suspicious about the origin of the ring. Despite this, however, the record discloses that the defendant, before the police entry, had already disposed of the jade ring.

[2] In defendant's motion to set aside the verdicts, defendant contended the verdicts were against the greater weight of the evidence. Under this motion, the trial judge has discretionary authority to set aside the verdict and order a new trial whenever it appears to him that the verdict is contrary to the greater weight of the credible testimony. *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975). The decision of the court involves the exercise of the court's discretion, is not a question of law and is not, therefore, reviewable. *Roberts v. Hill*, 240 N.C. 373, 82 S.E. 2d 373 (1954). The two assignments of error based on defendant's motions to set aside the verdict are overruled.

[3] In a later argument, defendant presents an additional reason that the motions to dismiss and to set aside the verdict were erroneously denied. Citing *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975), he contends that he was entrapped as a matter of law. With this contention we disagree. In the *Stanley* case, the Supreme Court held that the defendant, seventeen years old, was entrapped as a matter of law when an undercover policeman befriended him for several weeks and repeatedly asked defendant, without defendant's encouragement, to buy him drugs. In its analysis, the Court defined entrapment as "'the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him.'" *State v. Stanley*, *supra* at 27, 215 S.E. 2d at 594 citing 21 Am. Jur. 2d Criminal Law § 143. "'Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law enforcement officials.'" *State v. Stanley*, *supra* at 30, 215 S.E. 2d at 596, quoting *Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819,

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821, 2 L.Ed. 2d 848, 851 (1958). We find the factual circumstances of this case before us distinctly different from *Stanley*. Here, there was no evidence of an on-going relationship of trust or of repeated requests for defendant to perform illicit activities. At the request of the police who had reason to suspect defendant's purchase of stolen goods, Johnson approached defendant once with the jade ring and, a short while later, with the silverware. There was no evidence that the defendant was induced to commit a crime not contemplated by him, and there was, therefore, no entrapment as a matter of law. Defendant's motions to dismiss and to set aside the verdict were properly denied.

By his assignments of error numbered 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, based on twenty-nine exceptions duly noted in the record, defendant contends that the court erred to his prejudice by excluding evidence concerning the origin and use of the hot line, the defendant's use of the hot line both before and after his arrest, a typical transaction in defendant's store, threatening phone calls defendant had received, his previous involvement in the apprehension of criminals, his intentions at the time of the transactions with Johnson, and a conversation he had with his wife. Defendant argues that such evidence was competent to show "defendant's state of mind, motive, intent, knowledge and purpose, i.e., his lack of *mens rea*." In support of his theory, defendant relies heavily on the bard and quotes Mark Antony's famous eulogy, "The evil that men do lives after them/The good is oft interred with their bones." While we pass no judgment on Shakespeare's comments on good and evil, we certainly do not find them controlling, and we reject defendant's argument that the exclusion of the aforementioned evidence was prejudicial.

We have carefully examined each of the twenty-nine exceptions upon which these ten assignments of error are based and find that (1) a majority of exceptions were to the exclusion of evidence which was clearly irrelevant and immaterial; (2) much of the evidence defendant contends was excluded, having not been stricken, was not, therefore, excluded; (3) much of the evidence defendant contends was excluded was elsewhere clearly placed before the jury; and (4) much of the excluded testimony was never tendered, and this Court has no way to determine whether such exclusion was prejudicial to defendant. We find the assignments of error without merit.

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The next question raised by defendant pertains to four assignments of error involving the trial court's failure to charge the jury on attempt, circumstantial evidence, motive, and evidence of similar acts of the defendant. While we agree with defendant that the trial court erroneously defined the attempt to receive stolen goods by using the definition of actual receipt of stolen goods, we find that this error inured to the benefit of defendant and is not, therefore, reversible error.

[4] Furthermore, we do not find prejudicial error in the trial court's refusal to instruct the jury on the law of circumstantial evidence. Our courts have held repeatedly in cases where no instructions were requested that, when the State relies primarily on direct evidence to establish its case, it is not error to fail to instruct the jury on the law of circumstantial evidence. *See State v. Griffin*, 18 N.C. App. 14, 195 S.E. 2d 569 (1973). In the present case, defendant did request instructions on the law of circumstantial evidence. Nevertheless, we believe that, in view of the evidence properly admitted for both the State and the defendant, there was insufficient circumstantial evidence relevant to defendant's guilt or innocence to require the requested instructions.

Defendant's argument that the trial court should have instructed on the issue of defendant's motive is likewise rejected. Defendant has failed to show, and we cannot find, that the instructions requested, if given, would have led to a different result in defendant's trial. *See* G.S. § 15A-1442(4)(d), 1443(a).

As to defendant's contention that the court should have instructed on the evidence of specific good acts done by defendant, we find that such evidence was not properly admissible, *State v. Handsome*, 300 N.C. 313, 266 S.E. 2d 670 (1980), and instructions were not, therefore, necessary.

[5] Defendant next presents the question of whether the trial court erred when it refused to instruct the jury on the predisposition of the defendant to commit the crime and on the shifting of the burden of proof on the issue of entrapment. The record reveals the following pertinent instructions:

The defendant contends entrapment. Entrapment occurs when a person acting on behalf of a governmental agency induces the defendant to commit a crime not contemplated by



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the defendant for the purpose of instituting a criminal charge against him. Entrapment is a complete defense to crime charged. The burden of proof of entrapment is upon the defendant. However, the defendant is not required to prove entrapment beyond a reasonable doubt but only to your satisfaction. For you to find that the defendant was entrapped, you must be satisfied of three things: That the criminal intent to commit an attempt to receive stolen goods did not originate in the mind of the defendant. Second, that the defendant was induced by Stephon Johnson to attempt to receive stolen goods. Merely providing an opportunity to commit an attempted receiving stolen goods by Bruce Hageman would not be sufficient inducement—merely providing an opportunity to commit an attempted receiving stolen goods by Stephon Johnson would not be sufficient inducement. It must appear that Stephon Johnson used persuasion or trickery to cause the defendant to attempt to receive stolen goods, which he was not otherwise willing to do, and third, that Stephon Johnson acted on behalf of the Winston-Salem Police Department.

Therefore I charge that if you are satisfied from the evidence that the criminal intent did not originate in the mind of Bruce Gilbert Hageman and that Stephon Johnson induced Bruce Gilbert Hageman by persuasion or trickery to commit the crime of attempted receiving stolen goods, which he, Bruce Hageman, was not otherwise willing to do, and that Stephon Johnson acted on behalf of the Winston-Salem Police Department, you must return a verdict of not guilty.

Although the word "predisposition" is not used, we find these instructions sufficient on the concept that, when entrapment is at issue, the question of defendant's willingness, or predisposition, to commit the crime is raised.

Moreover, this Court, in previous cases, has rejected defendant's argument that, under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), the State is required to prove beyond a reasonable doubt that there was no entrapment. *State v. Wilkins*, 34 N.C. App. 392, 238 S.E. 2d 659, *disc. rev. denied*, 294 N.C. 187, 241 S.E. 2d 516 (1977); *State v. Braun*, 31 N.C. App. 101, 228 S.E. 2d 466, *disc. rev. denied and appeal dismissed*, 291 N.C. 449, 230 S.E. 2d 766 (1976).

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[6] Defendant's next argument is that it was legally impossible for him to have been convicted of feloniously receiving or attempting to receive the silver, in Case Number 80CR52198, because the silver had, in fact, lost its stolen character. Citing *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906), the defendant argues that the silver had lost its stolen character because it had been recovered by the police and that he, therefore, could not be guilty of receiving or attempting to receive stolen goods. In *Jaffe*, the New York Court of Appeals held it legally impossible to receive stolen goods or to attempt to receive stolen goods when the goods in fact were not stolen. We disagree. Instead, we adopt the reasoning of the Supreme Court of California, in *People v. Rojas*, 55 Cal. 2d 252, 358 P. 2d 921, 10 Cal. Rptr. 465 (1961), where it held that, if stolen goods were actually intercepted and taken in by the police and such interception changed the character of the goods so that no receipt of stolen goods was possible, the defendant nevertheless might be convicted of attempting to receive stolen goods. The California court stated that

the criminality of the attempt is not destroyed by the fact that the goods, having been recovered by the commendably alert and efficient action of the . . . police, had, unknown to defendants, lost their "stolen" status. . . . In our opinion the consequences of intent and acts such as those of defendants here should be more serious than pleased amazement that because of the timeliness of the police, the projected criminality was not merely detected but also wiped out.

*Id.* at 258, 358 P. 2d at 924, 10 Cal. Rptr. at 468.

In North Carolina, one can be convicted of attempting to receive stolen goods even though he was only indicted for receiving stolen goods. G.S. § 15-170; *State v. Parker*, 224 N.C. 524, 31 S.E. 2d 531 (1944). Thus, while the defendant in the present case was indicted for the actual receipt of stolen goods, we find no error in the trial court's submission of the issue of attempted receipt of stolen goods. From the evidence presented, the jury could have found beyond a reasonable doubt (1) that the silver was stolen pursuant to a breaking and entering, (2) that the police did take possession of the silver but returned it to Johnson for him to take to defendant, and (3) that defendant, with reasonable grounds to believe the silver to have been feloniously stolen or taken, purchased it from Johnson.

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The stolen jade ring presents a somewhat different question. From the record, the evidence appears uncontroverted that the police, although offered the ring, never accepted it. Rather, the police elected to let Johnson retain the ring while they conducted surveillance of Johnson and his sale of the ring to defendant. Under these facts, we find that the ring had not, therefore, come into either the actual or constructive possession of the owner or her agent, *Copertino v. United States*, 256 F. 519 (3d Cir. 1919), and that the ring never lost its stolen status. Defendant, in purchasing the ring, was, therefore, receiving (not merely attempting to receive) a stolen good. The instruction to the jury on the issue of attempted receipt of the stolen ring was error, but because defendant could have been convicted of actual receipt, neither it nor the verdict of attempt was error prejudicial to the defendant.

[7] Finally, defendant argues that the attempt of receiving stolen goods is a misdemeanor, not a felony, and that defendant's conviction for the felonious attempt to receive the stolen silver in Case Number 80CR52198 cannot stand. We agree. Absent statutory provisions to the contrary, an attempt to commit a felony is a misdemeanor. *State v. Hare*, 243 N.C. 262, 90 S.E. 2d 550 (1955). The only statutory exception possibly applicable to this rule in the present case in G.S. § 14-3(b) which provides that misdemeanors which are "infamous, done in secrecy and malice, or with deceit and intent to defraud," are punishable as felonies. We do not believe that an attempt to receive stolen goods falls within this class of misdemeanors. Hence, we vacate the judgment in Case Number 80CR52198 with directions that superior court resentence defendant as for a misdemeanor.

In summary, in Case Number 80CR51100, attempted receipt of stolen goods (the jade ring), there is no error.

In Case Number 80CR52198, attempted receipt of stolen goods (silverware), the judgment is vacated and the cause is remanded to superior court for resentencing as for a misdemeanor.

No error in part; vacated and remanded in part.

Judge HILL concurs.

Judge BECTON concurs in part and dissents in part.

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Judge BECTON, dissenting in part and concurring in part.

I have no quarrel with the majority's resolution of 80CRS51100—defendant's conviction of receiving a stolen ring. However, believing that the sterling silver items lost their character as stolen goods when they were recovered *and retained for twelve days by the police*, I dissent from that portion of the majority opinion finding "no error in the trial court's submission of the issue of attempted receipt of stolen goods." *Ante*, page 14. I am not persuaded, as is the majority, by the "reasoning of the Supreme Court of California, in *People v. Rojas*, 55 Cal. 2d 252, 10 Cal. Rptr. 465, 358 P. 2d 921 (1961)" that although it is legally impossible *to receive stolen property* after it has been recovered by the police or its owner, a defendant can nevertheless be convicted of *attempting to receive stolen property* which has been recovered by the police.

In the absence of a statute proscribing the receipt of goods that one mistakenly believes are stolen, whether stolen or not, I believe the sounder view to be that set forth in *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906)—that is, when the underlying offense is not a crime, there can be no conviction for attempting to commit that underlying offense.

The *Rojas* Court does correctly state the controlling principle: stolen property which the police have recovered is presumed to be "held by the police in trust for, or for the account of, the owner." 55 Cal. 2d at 258, 10 Cal. Rptr. at 469, 358 P. 2d at 925. Stated differently:

When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost, and the subsequent delivery of the property by the owner or agent to a particeps criminis, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime, for in a legal sense he does not receive stolen property.

*United States v. Cohen*, 274 Fed. 596, 599 (3rd Cir. 1921). This principle "had its genesis in two nineteenth century English cases. *Regina v. Schmidt*, L. R. 1 Cr. Cas. Res. 15 (1866); *Regina v. Dolan*, 29 Eng. Law & Eq. 533 (1855)." *United States v. Monaster-ski*, 567 F. 2d 677, 679 (6th Cir. 1977). See also 76 C.J.S. *Receiving*

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*Stolen Goods*, § 5(a)(2). This principle has been stated by our Supreme Court in dictum in *State v. Collins*, 240 N.C. 128, 81 S.E. 2d 270 (1954). Although the issue in *Collins* was whether the goods had ever been stolen, not whether they had lost that status, the *Collins* Court, quoting *Farzley v. State*, 231 Ala. 60, 61, 163 So. 394, 395 (1935) said: "'But it is essential to the crime here charged [receiving stolen property] that the goods received by defendant were stolen *and retained that status* until they were delivered to defendant.'" *Id.* at 131, 81 S.E. 2d at 272 (emphasis added).

The majority does not seek to apply this controlling principle of law to the facts of this case; rather, the majority suggests, on policy grounds, that "the commendably alert and efficient action of the . . . police", *ante* page 13, in ferreting out criminality is the polar star and the controlling consideration. The majority also suggests that the general rule that criminal statutes are to be strictly construed against the State should be relaxed.

The statute under which defendant was charged makes it a crime to receive stolen goods. At some point in time, recovered goods must cease being stolen goods. See *United States v. Dove*, 629 F. 2d 325 (4th Cir. 1980) and *United States v. Monasterski*. I believe that "the best and only workable rule is the common law rule—*viz*, the goods lost their stolen character immediately upon being recovered by the owner or his agent." *Monasterski*, 567 F. 2d at 681. See also *United States v. Cawley*, 255 F. 2d 338 (3rd Cir. 1958).

The *Rojas* rule which allows the police to capture and hold recovered goods for some unspecified period of time without the goods losing their character as stolen goods is unworkable. Moreover, to the extent that the police in the *Rojas* case were mere conduits through which the stolen goods passed *immediately and directly* to the defendants therein, *Rojas* is factually distinguishable. The *Rojas* Court considered the following facts, all of which occurred within one day: A theft; an arrest; a recovery of stolen goods; an agreement by the person arrested to help police catch one of the defendants; and a delivery of the recovered goods, by the person arrested and a police officer, to one of the defendants. It could almost be said that the stolen goods never left the thief's hands until it got to the defendant's hands in *Rojas*.

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The factual pattern in *Rojas* is not nearly as compelling as the facts in the case *sub judice*. In this case, the theft occurred in Winston-Salem on 5 December 1980. Stephon Johnson, the thief, was arrested when he tried to sell some of the stolen goods in Greensboro on 6 December 1980. At that time the police recovered the stolen goods. Subsequently, Johnson posted bond. He later tried to borrow money from the defendant in order to get a friend out of jail on bond. On 17 December 1980 Johnson went to court for a preliminary hearing on the theft charge. On 18 December 1980 Johnson went to the Winston-Salem Police Department and agreed with law enforcement officials to go to defendant's place of business to try to sell defendant the sterling silver items that the police had recovered twelve days earlier.

What if Stephon Johnson had not agreed to help the police catch the defendant until the day after Stephon Johnson's trial, some four months later, instead of the day after his preliminary hearing? Would the goods have lost their stolen character by then? Again, at some point, recovered goods must cease being stolen goods. A strained reading of the words "stolen goods" would result otherwise and would lead to unnecessary uncertainty. *United States v. Monasterski*, 567 F. 2d at 681.

I have not turned a deaf ear to the policy arguments advanced by the State and subsumed in the majority opinion. Indeed, because the defense of legal impossibility can create "a fringe benefit for criminals," *United States v. Egger*, 470 F. 2d 1179, 1181 (9th Cir. 1972), *cert. denied* 411 U.S. 954, 36 L.Ed. 2d 416, 93 S.Ct. 1931 (1973), the prosecutor's argument that "there is just as much need to stop, deter, and reform a person who has unsuccessfully attempted or is attempting to commit a crime as who successfully completes a crime" is, as a practical matter, compelling. The defendant herein may have intended to possess goods knowing them to be stolen. We must be guided by the law, however.

Our law does not punish bad purpose standing alone, however; instead we require that *mens rea* accompany the *actus reus* specifically proscribed by statute. It is one of the most fundamental postulates of our criminal justice system that conviction can result only from a violation of clearly defined standards of conduct. We must apply this principle

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evenhandedly and not be swayed by our attitudes about the moral culpability of a particular defendant. It is the function of our legislatures, not courts, to condemn certain conduct. Petitions to punish reprehensible conduct must be addressed to the Congress and not this Court. Being bound by the current statutory language, this case simply does not involve the proscribed criminal act.

*United States v. Monasterski*, 567 F. 2d at 683.

Nothing said herein closes the door to the State's meritorious desire to apprehend "fences." As suggested above the General Assembly can enact a statute to cover the activity involved in this type of case.<sup>1</sup> Second, the State can charge "fences" with conspiracy in cases in which it can show the necessary elements of conspiracy. Third, the State can conduct a surveillance of the stolen goods until they are delivered to the "fence" and then arrest that person.

Believing that our law will not allow a conviction of attempting to receive stolen property, when the underlying offense—receiving stolen property—would not be a crime, I vote to reverse defendant's conviction in 80CRS52198.

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DENNIE J. TAYLOR, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION,  
EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DE-  
FENDANTS

No. 8110IC593

(Filed 16 March 1982)

**1. Master and Servant § 68— byssinosis not compensable under prior statute**

Byssinosis was not an "inflammation of the skin, eyes or other contact surfaces or oral or nasal cavities" within the purview of G.S. 97-53(13) at the time plaintiff became disabled on 5 January 1963 and thus was not an occupational disease for which plaintiff was entitled to compensation.

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1. The North Carolina General Assembly in its 1980-81 session had an opportunity to enact as law a bill that would have addressed the issues raised herein. Representatives Helms and Tyson introduced H.80, "Act to Codify the Crime of Attempting to Receive or Possess Stolen Property and to Preclude the Defense of Impossibility so that Fencing Operations May Be Prosecuted More Effectively." The bill was reported unfavorably by the House Judiciary 1 Committee.

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**2. Master and Servant § 68— occupational disease—byssinosis—no coverage under Session Laws for disablement prior to 1 July 1963**

Chapter 1305, 1979 Session Laws, which provides that claims for byssinosis "which can be proved under G.S. 97-53(13) shall be compensable regardless of the employee's date of last injurious exposure," does not provide coverage for employees disabled from byssinosis prior to 1 July 1963, the effective date of the amendment to G.S. 97-53(13) adding infection and inflammation of internal organs to the list of occupational diseases.

Judge WEBB dissenting.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion entered 31 March 1981. Heard in the Court of Appeals 4 February 1982.

Plaintiff's claim is for the occupational disease byssinosis. Plaintiff's work history showed that while he was employed by defendant Cone Mills, he was regularly exposed to cotton dust for about 13 years. His last exposure was on 4 January 1963. During his employment with defendant, plaintiff developed severe chronic obstructive lung disease and byssinosis, and suffered permanent injury to his lungs.

After the hearing, Deputy Commissioner Ben E. Roney, Jr. entered an opinion and award in which he concluded that at the time plaintiff became disabled on 5 January 1963, byssinosis was not a compensable disease, but that plaintiff was entitled to an award for permanent injury to his lungs, which injury caused a diminution of plaintiff's earning capacity. The conclusions of law entered by Deputy Commissioner Roney were as follows:

1. The coverage formula governing the rights and liabilities of the parties to this claim extends to "(i)nfection or inflammation of the skin, eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances." (Citations omitted)

2. The respiratory surfaces of the lungs are not external contact surfaces of the body. The lungs are essential internal organs of respiration. (Citations omitted)

3. Claimant became incapacitated on 5 January 1963 to earn the wages he was receiving at the time thereof in the same or any other employment due to permanent injury to



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important internal organs of the body resulting from byssinosis. . . . The coverage formula for occupational diseases extant on 5 January 1963 did not provide for payment of compensation for disability occasioned by byssinosis. . . . Claimant is, nevertheless, entitled to compensation for permanent injury to important organs of the body occasioned by byssinosis that may be reasonably presumed to have caused a diminution of his future earning capacity, the value of which is \$7,000.00. (Citations omitted)

Both plaintiff and defendant appealed to the Full Commission. On review, the Commission, Commissioner Vance dissenting, modified Deputy Commissioner Roney's conclusions of law by striking the last sentence in conclusion number 3, and denied plaintiff's claim. Plaintiff has appealed.

*Smith, Patterson, Follin, Curtis, James & Harkavy, by Henry N. Patterson, Jr., Michael K. Curtis and Jonathan R. Harkavy, for plaintiff-appellant.*

*Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for defendant-appellees.*

WELLS, Judge.

This appeal presents two questions of law, as follows:

I. Is compensation payable under the Workers' Compensation Act to an employee disabled from byssinosis when the date of last injurious exposure and the date of disability occurred prior to July 1, 1963?

II. Does Chapter 1305, 1979 N.C. Session Laws provide coverage for employees last injuriously exposed and disabled from byssinosis prior to July 1, 1963, even if compensation is not otherwise payable under the Workers' Compensation Act?

The essential facts as to plaintiff's illness found by Deputy Commissioner Roney are not in dispute. The findings as to the nature and manifestation of byssinosis are set forth with such clarity, however, that we deem it appropriate to quote them as follows:

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12. Byssinosis is a disease proven to be due to causes and conditions peculiar to and characteristic of employment in cotton textile mills. The precise identity of the offending agent is unknown. . . .

13. The pathology of byssinosis is essentially that of chronic bronchitis; i.e., inflammation of the small airways that conduct air to and from the alveoli. Mucous production and white blood cell recruitment occurs when respirable cotton trash dust falls onto the cells of the airways. Mediators are released, causing narrowing of the airways. An asthmatic like response results. Increase in body temperature and decrease in the capacity of the lungs to exchange gas are acute responses to exposure to respirable cotton trash dust.

[1] Plaintiff first argues that at the time he became disabled in January, 1963, byssinosis fell within the general definition of occupational diseases set out in G.S. 97-53(13), as the statute was then worded, as follows:

Infection or inflammation of the skin, eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases, or vapors, and any other materials or substances. (1935 N.C. Pub. Laws ch. 123, as amended by 1957 N.C. Sess. Laws ch. 1396, § 6.)

Plaintiff argues that the only medical evidence in the record on point classifies byssinosis as an inflammation of an external contact surface and of the nasal cavities. One of plaintiff's expert medical witnesses was Dr. Kaye H. Kilburn, whose qualifications are, briefly, as follows. Dr. Kilburn became Board Certified in Internal Medicine in 1963. From 1962 to 1969, he was an associate professor of medicine at Duke University, during which time he served as Chief of Medical Service at the Veteran's Administration Hospital in Durham. From 1968 to 1975, he was Director of the Division of Environmental Medicine at Duke University Medical Center. From 1973 to 1977 he served as Director of the Division of Pulmonary and Environmental Medicine at the University of Missouri—Columbia. At the time he gave his testimony, he was a Professor of Medicine at Mt. Sinai School of Medicine of the City University of New York. Dr. Kilburn's publications number more than one hundred, including a number of papers dealing

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specifically with chronic obstructive lung diseases, including byssinosis, in textile workers. Dr. Kilburn has done extensive research on the causes and characteristics of byssinosis.

We believe that Dr. Kilburn's testimony on byssinosis is of such clarity that it would be helpful to bench and bar for us to take the unusual step of quoting it in substantial detail.

Byssinosis has its origins lost almost in antiquity. Evidently, all the time that man has used plant fibers—cotton, flax and soft hemp for clothing and rope making and so on, the processors of these materials have noticed an illness characterized by coughing and shortness of breath. Its classic description was made by Ramazzini in the 1700's in Italy.

Since that time it has been periodically, in a sense, rediscovered, and much of its history is from the Lancashire cotton mill area of England where Kay and Prausnitz did classic studies of it in the 1930's. In the 1950's the team of Schilling and McKerrow also did studies of this disorder which was caused by the breathing of textile dust in mills processing cotton. Interestingly enough, at that time and now, English mills largely process United States cotton.

The Schilling studies and the Hill studies demonstrated that there is an increased illness, chronic respiratory illness which culminates in early retirement for disability. So in England byssinosis has been a compensable disease since the early 1940's, and the requirements have become increasingly lenient.

First, they thought it took twenty years to develop a chronic disease, and then they thought it took ten years. And now I believe it is down to four or five years.

In this country, the experience with the disorder goes back about ten or fifteen years, although there were periodic papers in the 1940's and the early 1950's. Bouhuys and Schilling did a small study in Western North Carolina. I think it was 1961. Dr. Heaphy and I did a small study in Durham, North Carolina in 1963.

Then the substantial studies were begun in Gastonia in 1968 by Merchant and Reiss and Rausch and Harris and

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Hamilton and myself and John Lumsden, from the North Carolina State Board of Health.

With the development of the vertical elutriator by John Lumsden and Jerry Lynch from the National Institute for Occupational Safety and Health, respirable dust could be measured. We then did an extensive study of over 3,000 workers at Burlington Mills in North Carolina between 1969 and 1972. The studies demonstrated that there was a linear response curve between respirable cotton dust, that is the cotton dust that can be taken further than the nose in the strained breathing air mask, and the symptoms of shortness of breath, coughing and sputum production.

That study was the basic data for the establishment of the cotton dust standard. This standard was adopted first by NIOSH as a recommendation and then by OSHA, more or less simultaneously with the development of this body of data which was based on clinical demographics and some chemical studies of people.

We studied the bract material, cotton dust material in experimental animals, and demonstrated that hamsters or rats could imitate the human response as far as showing nasal and respiratory leukocyte recruitment of airways.

Then we attempted to isolate various chemical agents from the bract material to see which one was the most responsive, and have actually come up with several candidates now for producing most or all of the picture of byssinosis.

The sentinel characteristic of byssinosis, like those of chest pains characterizing angina or heart disease, is the tightness in the chest, shortness of breath and the so-called Monday morning asthma that is not quite Monday morning because it tends to come on about noon or so of the first shift. People coming back after a weekend away from the mill experience that. That is the most characteristic and universal part of the disease.

Clinically, cough and sputum production is less common but also important. As people are chronically exposed, they develop small airway disease with continuous progressive

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reduction of pulmonary function, particularly of expiratory air flow until they are disabled after usually several years of exposure.

The x-ray pattern is indistinguishable from normal. There are no x-ray characteristics of the disease. The pathology has now been studied by two or three responsible and careful groups, including Philip Pratt from Duke. The pathology is essentially that of chronic bronchitis, that is, there is inflammation of the airways of the lung, not of the alveoli, but of the conduit airways, particularly the small airways that conduct the air being breathed out into the alveoli.

This inflammation is characterized by excessive mucus production and recruitment of white blood cells and some proliferation of connective tissue, so that essentially the airways are functionally closed either by mucus plugs or by scarring after chronic exposure.

It is quite similar to the bronchitis caused by cigarette smoke, but sufficient people who don't smoke have been studied to determine that it doesn't require any kind of interaction between smoking. However, there is a positive interaction, but it is not required to cause the disease.

I will comment briefly on the relationship between byssinosis and cigarette smoking. In the studies which we did, which rest on over 3,000 men and women, there was a different dose response curve in the smoker than in the non-smoker. In other words, a given amount of cotton dust produced greater effect in smokers than in non-smokers.

This could be due to two possibilities: One could be that the smoker is more susceptible but that seems unlikely because usually smokers are on the other edge of the population. They are less responsive to irritating agents. So we noticed this, and I think it is generally thought by students of the disease that they are additives—that the damage done by cigarette smoke and the damage done by cotton dust add. We haven't quite translated years of card room exposure into years of cigarette smoking, but such a computation is certainly reasonable. I am not sure exactly what numbers to put on it, but there is a relationship, it is clear.

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Byssinosis in its chronic form is disabling. It produces sufficient impairment of breathing that people find they can't do their usual job, particularly in the card room where the usual job is carrying and mounting laps on the carding machines which are 80 or 90 pounds of weight. This can incapacitate someone who could go on for many years as a doctor or a lawyer or a watchmaker, because the activity requirement there or in the spinning area requires a lot of activity. What it means is that a good many people by the time they are 50 years old or so—if that means they have had twenty years' exposure—are not only legally retireable, they even fulfill more stringent Social Security criteria for retirement for respiratory disability.

Byssinosis is a disease due to causes and conditions characteristic of employment in textile mills producing cotton. It is not a disease that the general public is equally exposed to, outside of employment in those areas. The only way the general public could be exposed would be if they happened to be in the effluent of a mill or cotton gin, or if they were in the atmosphere or air space of the workplace, which is in the mill. Cotton goods that have been dyed or washed or otherwise treated have lost their capacity to produce any kind of ill effect.

Card room employees are at much greater risk of having this disease than the general public. If one looks at the relative risk in the mill, the opening, picking, carding areas where the bales are broken and fluffed up with air and transported and carded (which is basically not only a fibre straightening but a trash removal operation) is where most of the exposure is.

In spinning, there is a lesser exposure, and I say this again based on our 3,000-worker study, and by the time you get to weaving, the average exposure is considerably reduced and may only be ten or twenty per cent as high. Much depends on, unfortunately, not only what is going on in the work area but where the air for that work area is coming from.

If it happens to be a large loft-like room with carding on one end and spinning and weaving on down in the edges of

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the same room, then your weave room worker may have substantial exposure. It is a matter of the airborne material rather than the operation. But still, in general, where it is generated, the doses are highest, and on down the line the dosage of cotton dust goes down.

I have an opinion on whether or not byssinosis is an inflammatory process. It is an inflammation in the sense that that is a general scriptor for response by cells or tissues in the body to an extraneous environmental material. The inflammation of cigarette smoke I have already commented upon. Formaldehyde, which is a common enough chemical, or nitrogen dioxide, are inflammation-producing materials.

The cotton dust, besides being a primary inflammation producer which causes swelling of cells and leakage of fluid and recruitment of inflammatory cells from the blood, the leukocytes, also, because there is a particle, causes a certain amount of chronic response, and in that way resembles farmer's lung or even silicosis or asbestosis. The particles are digestible—that is, they are eaten and completely digested by the body cells.

I don't want to give the misimpression that it is like asbestosis or silicosis, but it shades toward those in an intermediate area between the noxious gases which are on one extreme, and the particles which are on the other extreme.

What I am really saying is it produces responses by the bleaching out of an active ingredient, and then by the nature of its being a particle, it has to be disposed of and it causes a further reaction.

I have done laboratory research in this particular area. Since 1970 we have had almost continuous interest in looking at the responses of cells in experimental animals, either isolated cells or isolated airways, or intact airways in the animal, or intact airways over substantial periods of time—15 days of exposure; 30 days of exposure. So, my opinion is based on both the modeling of the disease in the experimental animal, as well as the rather constant comparisons that we made with the human situation.

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I have been asked if I have an opinion whether byssinosis is an inflammation of the skin or other external contact surface or of the oral and nasal cavities, as these terms are understood by physicians dealing with this condition. It does produce an inflammatory response in the conjunctiva of the eye and in skin areas such as the nose, external portion of the nose, and we have done an actual nasal swabbing from textile workers before and after exposure, and it has shown inflammatory responses.

There is a shift from the nature of the cells from being mononuclear to being the acute inflammatory response cells which are polymorphonuclear leukocytes. So that during a daylong, shift-long exposure, we were able to show that not only was there an increase in the recruitment of these cells into the nose, but there was an increase in inflammatory cells in the blood. There was an increase in body temperature, and this coincided in time to decreases in the FEV-1—in the forced vital capacity—so that in human cardroom workers, a panel of them which we studied, their response to dust manifested itself in the eye, nose, respiratory tract, below the nose, blood and then in overall lung function, as measured by the standard pulmonary function test.

That gave us considerable confidence that in fact it is the exposure to dust.

These were, of course, compared with control periods when one ran rayon in the same model cardroom or ran nothing at all and simply used the air filter system to ensure that particulates were not picked up somewhere else and carried in. That was work that has been published, so it has stood peer review by other scientists.

I have been asked if I have an opinion on whether byssinosis is also an inflammation of the external contact surface. I think it truly has to be considered, as we have for many years in the study of lung disease, that the entire respiratory surface of the lung is an external contact surface. That is what all our air pollution legislation is based on. There is solid experimental and epidemiologic evidence that though we have something in the neighborhood of one-half to two square meters of body surface which is skin, we have in



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the neighborhood of 180 square meters or roughly the size of a tennis court of body surface, which is lung, and both are in the same intimate contact with the air which we walk around in and breathe. (sic) But one is 100 times as extensive as the other, so that plus the fact the lung is sort of one thin cell thick and the skin is many cells thick.

So, in terms of being responsive to environmental materials, whether they be natural or manmade, the lung is an external contact surface which is responsive to this material, whatever it be, that we get in this mixture which we breathe and call air.

On cross-examination, Dr. Kilburn described and explained some of the studies and theories associated with the recognition of byssinosis, the precise irritating agents in cotton dust, and the physiological changes in the respiratory tract associated with byssinosis, but he did not modify his opinion that byssinosis causes an inflammation of an external contact surface and of the nasal cavities and the eyes.

To begin our analysis of this case, we recognize the rule announced in *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979) and affirmed in *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980) that plaintiff's right to compensation must be determined under the statute in effect at the time he became disabled, that date being 5 January 1963. The history of G.S. 97-53(13), as it then existed, was clearly and succinctly set out by Judge Hedrick in the opinion of this Court in *Wood v. Stevens & Co.*, 36 N.C. App. 456, 245 S.E. 2d 82 (1978), *modified and remanded* in *Wood v. Stevens & Co.*, *supra*, and we need not repeat it here. Plaintiff's first argument in this case depends entirely upon a determination of whether plaintiff was disabled by an "[i]nflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavities. . . ." It first must be made clear that the undisputed finding that plaintiff was disabled by reason of byssinosis does not resolve the question before us. Although Dr. Kilburn's testimony that byssinosis can and does cause irritation of the eyes and nasal cavities is clearly competent to aid the Commission and us in discerning the legislative intent as to these terms, *Wood v. Stevens & Co.*, *supra*, the evidence in this case clearly fails to support any conclusion that plaintiff's disability

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resulted from such an inflammation of his eyes or nasal cavities. On the other hand, the evidence does clearly establish, as the Commission found, that plaintiff was disabled by reason of the effects of byssinosis on his lungs. The dispositive question as to plaintiff's first argument is whether byssinosis manifests itself as an irritation of "other external contact surfaces" of the human body; or, put another way, whether the legislature intended that, as Dr. Kilburn put it, that the "entire respiratory surface of the lung[s]" be considered an "external contact surface", as those terms were used in the statute as of January, 1963. These terms are not technical and should therefore be construed in accordance with their common and ordinary meaning. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1979), and cases cited there. The key word is "external," and we construe its commonly accepted and ordinary usage to mean something capable of being perceived outwardly, something situated or relating to the outside or outer part of the object under consideration. See Webster's 3d New Int'l Dict. (unabridged). Our construction is supported by the fact that effective 1 July 1963, G.S. 97-53(13) was amended to include "internal organs" of the body, a term which clearly includes the lungs. See *Taylor v. Stevens & Co.*, *supra*. Despite Dr. Kilburn's stimulating and enlightened testimony, we reject plaintiff's argument that Dr. Kilburn's present opinion, based upon the impressive research carried out by him and other experts in the study of byssinosis during the past ten to fifteen years, should be engrafted upon the legislative intent as that intent was manifested when the statute in question was enacted.

[2] We next address the question of the effect of the enactment of Ch. 1305 of the 1979 Session Laws on plaintiff's claim. We quote that Act in its entirety:

AN ACT TO PROVIDE THAT BYSSINOSIS, KNOWN AS "BROWN LUNG DISEASE", SHALL BE DEEMED AN OCCUPATIONAL DISEASE WITHIN THE MEANING OF G.S. 97-53(13) FOR PURPOSES OF WORKMEN'S COMPENSATION CLAIMS REGARDLESS OF THE DATE THE DISEASE ORIGINATED.

The General Assembly of North Carolina enacts:

Section 1. Claims for "brown lung disease", which can be proved under G.S. 97-53(13) shall be compensable regardless of the employee's date of last injurious exposure.

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Sec. 2. This act is effective upon ratification.

Sec. 3. This act will expire April 30, 1981; however, this provision does not apply to any claims filed prior to April 30, 1981.

In the General Assembly read three times and ratified, this the 25th day of June, 1980.<sup>1</sup>

Plaintiff argues that regardless of whether he comes within the purview of the January 1963 version of G.S. 97-53(13), he is entitled to compensation by reason of the above Act. Again, we cannot agree. First we note that the date on which plaintiff's occupational disease "originated"—the operative term used in the caption to the Act—has no relevance to his claim.<sup>2</sup> It is the event of disability that triggers entitlement to compensation. G.S. 97-52; *Wood v. Stevens & Co., supra*. For the reason that the event of disability controls, neither does the date of plaintiff's last injurious exposure,—the operative words in Sec. 1—standing alone, have any significance to the plaintiff's claim. In reaching this conclusion, we have considered the implications of the wording of the last paragraph of Chapter 965 of the 1963 Session Laws, the Act which amended G.S. 97-53(13) to include infection and inflammation of internal organs in the list of occupational diseases. That paragraph is as follows:

The provisions of this subsection shall not apply to cases of occupational diseases not included in said subsection prior to the effective date of this Act<sup>3</sup> unless the last exposure in an occupation subject to the hazards of such disease occurred on or after the effective date of this Act.

Disability being an event which would necessarily follow "last exposure," this paragraph has no effect on plaintiff's claim, whose disability pre-dated the effective date of the 1963 Act. For the same reason, Section 1 of Chapter 1305 of the 1979 Session Laws

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1. Ch. 1305 does not enact or amend a General Statute and it is therefore not found in the compilation of the General Statutes.

2. Due to the insidious nature of byssinosis, it is unlikely that it would ever be possible to establish the date such a disease originated.

3. 1 July 1963.

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does not operate to have any effect whatsoever on plaintiff's claim.

For the reasons stated, the opinion of the Industrial Commission is

Affirmed.

Judge MARTIN (Robert M.) concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I cannot agree that the words "external contact surface" have no technical meaning. Dr. Kilburn testified that the respiratory surface of the lung is an external contact surface. As I understand his testimony, this is so because this surface is in intimate contact with the air around us which we breathe. Since the testimony was that byssinosis is an inflammation of the airways of the lung caused by inhaling cotton dust, this would be an inflammation of an external contact surface which would make the plaintiff's disease compensable under G.S. 97-53(13) as it existed in 1963. I believe the Industrial Commission should have so found. I vote to reverse.

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STATE OF NORTH CAROLINA v. MICHAEL VANCE POPLIN

No. 8120SC560

(Filed 16 March 1982)

**1. Constitutional Law § 30; Bills of Discovery § 6— failure to comply with discovery order— denial of motion to dismiss proper**

In a prosecution for aiding and abetting the sale of cocaine, the trial court did not abuse its discretion under G.S. 15A-910 in denying defendant's motion to dismiss or to continue his case on the ground the State had not complied with a motion for discovery where (1) before the trial began the court heard the motion for discovery and after the State had furnished certain items to the defendant, he indicated he was satisfied, (2) defendant's attorney stated that if there were some "great discrepancy" in the substance analyzed, he might want to have it examined, and (3) after the trial had commenced, a chemist for the

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State Bureau of Investigation testified that at the time he examined the substance it was not of the consistency that it was in the courtroom.

**2. Narcotics § 2— indictment—failure to name party aided and abetted**

Where an indictment charged that defendant aided and abetted in the sale and delivery of cocaine, the failure to name the party whom the defendant aided and abetted did not violate G.S. 15A-924.

**3. Criminal Law § 69— evidence of telephone conversations not prejudicial—identification by voice**

A witness's identification of the defendant as the person to whom he spoke by telephone was properly admitted where the witness testified that before going to defendant's home he called twice and asked for Mike; that each time he was told that Mike was not there but would return; that he called later and talked to the defendant in regard to the sale of drugs; that he went to the defendant's home and talked to him at which time he recognized defendant's voice as being the voice of the Mike he had talked to by telephone. Evidence of the conversation with the person to whom the witness talked before he talked to Mike was not prejudicial to defendant.

**4. Criminal Law § 88.1— cross-examination—properly limited**

The trial court properly sustained objections by the State to questions asked by defendant on cross-examination of the State's witnesses where one of the questions asked what procedures were prescribed by the State Bureau of Investigation as to testing the substance confiscated, other questions were repetitious or argumentative, and where the court allowed extensive cross-examination of the witnesses.

**5. Criminal Law § 51.1— qualification of expert in chemical analysis**

There was sufficient evidence for the court to find a witness was an expert in chemical analysis where the witness testified that he had a B.S. degree in Chemistry from North Carolina State Univeristy, that he had ten years experience in analyzing subjects for chemical content, and he had attended several schools dealing with chemical analysis.

**6. Criminal Law § 42.6— chain of custody—sufficiency of evidence**

Evidence was sufficient to prove an unbroken chain of custody where it tended to show that a witness testified he kept the evidence in his possession or in a locked cabinet until he mailed it to the State Bureau of Investigation Laboratory in a sealed envelope and where another witness testified he received the envelope, analyzed the contents, and mailed the substance in a sealed envelope back to the first witness.

**7. Criminal Law § 99.5— judge's comments to counsel—no expression of opinion**

Remarks by the trial judge which directed the defense counsel not to argue with the witness or the district attorney, to give the witness time to answer, or to proceed with his questions did not amount to an expression of an opinion by the court.

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**8. Criminal Law § 9.1; Narcotics § 4— aiding and abetting sale of cocaine—sufficiency of evidence**

There was sufficient evidence to support defendant's conviction of aiding and abetting in the sale of cocaine where the evidence tended to show that defendant told a witness he had retired but would send someone to pick him up; an automobile arrived and carried the witness to defendant's home; defendant stated that he did not handle cocaine any longer but someone else would handle it; another man stated to the witness that he was the man with whom he would deal; defendant lay on the couch in the living room while the witness and another person got cocaine from a birdhouse in defendant's yard; and they returned to the living room and exchanged \$1200 in the presence of the defendant.

**9. Criminal Law § 118— recapitulation of evidence—discrepancies not called to attention of court**

Where the defendant did not call to the attention of the court discrepancies in the evidence and what the defendant contends should have been recapitulated, there was not reversible error in the failure of the court to charge on certain contentions of the defendant.

**10. Criminal Law § 101— denial of request to allow jury to take items to jury room**

The denial of a motion by defendant that jurors be allowed to take to the jury room certain photographs, the warrant and the bill of indictment was within the discretion of the court. G.S. 15A-1233(b).

**11. Criminal Law § 139; Narcotics § 6— maximum sentence imposed—no error**

In a prosecution for aiding and abetting the sale of cocaine, the trial court did not err in imposing the maximum sentence of not more nor less than ten years and a fine of \$10,000.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 22 January 1981 in Superior Court, STANLY County. Heard in the Court of Appeals 11 November 1981.

The defendant was tried for aiding and abetting the sale of cocaine. The State's evidence tended to show that M. B. Robertson, a Special Agent of the State Bureau of Investigation, was working as an undercover agent in Stanly County on 21 July 1980. On that date, he went to the home of the defendant and was introduced by the defendant to Larry Blalock. Mr. Robertson followed Mr. Blalock to a utility pole in the defendant's backyard on which utility pole was a birdhouse. Mr. Blalock removed a package from the birdhouse and handed it to Mr. Robertson. The two men then returned to the house and Mr. Robertson in the presence of the defendant gave \$1,200.00 to Mr. Blalock. An

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analysis of the contents of the package revealed the package contained cocaine.

The defendant was convicted and appealed from the sentence imposed.

*Attorney General Edmisten, by Associate Attorney Richard H. Carlton, for the State.*

*Joe D. Floyd and David K. Rosenblutt for defendant appellant.*

WEBB, Judge.

[1] The defendant has brought forward 18 assignments of error. He first argues that it was error not to dismiss the case or otherwise impose sanctions upon the State for the failure of the State to comply with the defendant's motion for discovery. The defendant made a request for voluntary discovery pursuant to G.S. 15A-902 on 10 November 1980. He then filed a motion for discovery pursuant to G.S. 15A-903 on 2 December 1980. This motion was not heard until the case was called for trial. When the case was called for trial the court heard the motion in the absence of the jury panel and before a plea was taken. At that time the State furnished the defendant with certain items for which the motion for discovery had been made. The defendant's attorney then announced: "Your Honor, I think that they have more or less complied at this time with our requests." The defendant's attorney stated further that he presumed the agent who analyzed the substance would testify and he did not anticipate wanting to make an examination of the substance "unless we find later that there is some great discrepancy . . . But we would like to sort of leave that open in case that something happens that this particular officer is not here to testify who ran the results of these tests." The defendant's attorney stated that for the record he made a motion to dismiss or in the alternative a motion to continue on the ground the State had not complied with the motion for discovery. These motions were denied.

After the trial had commenced the State called T. H. McSwain, a chemist for the State Bureau of Investigation, to testify as to the results of the analysis of the substance in the package. A *voir dire* hearing was held out of the presence of the

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jury. Mr. McSwain testified that at the time he examined the substance it was not of the consistency that it was in the courtroom. He testified when he examined it, it was crumbly but was more or less like a wad of gum in the courtroom. The defendant renewed his motion to dismiss or to continue the case on the ground the State had not complied with the motion for discovery. The court denied the defendant's motion.

We hold that the court did not abuse its discretion under G.S. 15A-910 in denying the defendant's motion. Before the trial began the court heard the motion for discovery and after the State had furnished certain items to the defendant he indicated he was satisfied. It is true that his attorney stated that if there were some "great discrepancy" in the substance, he might want to have it examined. We believe the court was within its discretion in denying the renewal of the motion when it was found during the trial that the substance had changed its consistency from the time Mr. McSwain examined it and the time it was offered in evidence. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant challenges the sufficiency of the indictment. The indictment charges that the defendant aided and abetted the sale and delivery of cocaine to M. D. Robertson. It does not name the person who was allegedly aided and abetted in the sale. The defendant argues this constitutes a fatal defect in the indictment. He cites several cases from the federal courts and from the courts of other states in support of this argument. G.S. 15A-924 provides in part:

"(a) A criminal pleading must contain:

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- (5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. . . ."

We hold that the failure to name the party whom the defendant aided and abetted did not violate G.S. 15A-924 by failing to assert a fact supporting an element of the offense. We believe the indict-



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ment asserted facts supporting every element of the criminal offense and the defendant's commission of it so that the defendant should have clearly been apprised of the conduct which was the subject of the accusation. This would conform to the requirements of G.S. 15A-924 without naming the party whom the defendant was alleged to have aided and abetted. *See State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953) for the requirements of a bill of indictment.

[3] In this third assignment of error the defendant argues that it was error for Mr. Robertson to testify as to certain telephone conversations. Mr. Robertson testified that before going to the defendant's home he called twice and asked for Mike. Each time he was told that Mike was not there but would return. Mr. Robertson testified further that he called later and talked to the defendant in regard to the sale of drugs. He then went to the defendant's home and talked to him at which time he recognized defendant's voice as being the voice of the Mike he had talked to by telephone. The defendant contends this testimony should have been excluded on the ground that the identity of the persons to whom Mr. Robertson talked was not sufficiently established. As to the conversation with the person to whom Mr. Robertson talked before he talked to Mike, we do not believe this was prejudicial to the defendant. It produced no substantive evidence against him. As to the witness's identification of the defendant as the person to whom he talked, we believe there was sufficient evidence of identification for this testimony to be admissible. *See State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975) and *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948) for a discussion of the identification requirements of a telephone conversation.

Under his third assignment of error the defendant also contends it was error not to exclude Mr. Robertson's testimony as to his conversation with Larry Blalock when the two of them left the presence of the defendant to get the package from the birdhouse on the utility pole. We hold this was properly admissible as testimony accompanying and characterizing an act. *See* 1 Stansbury's N.C. Evidence § 159 (Brandis rev. 1973). The defendant's third assignment of error is overruled.

In his fourth assignment of error the defendant contends he was prejudiced because the court denied his motion to sequester

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the State's witnesses. The motion to sequester was made after Mr. Robertson had commenced his testimony. The only other witness for the State was T. H. McSwain who testified as to his analysis of the contents of the package. We hold the court did not abuse its discretion by denying this motion to sequester the witnesses.

[4] The defendant's fifth assignment of error pertains to the sustaining of objections by the State to questions asked by the defendant on cross-examination of the State's witnesses. Mr. McSwain testified on *voir dire* as to the tests he ran on the substance. Defendant asked on cross-examination what procedures were prescribed by the State Bureau of Investigation as to testing the substance to which the court sustained the objection of the State. The record does not show what the witness's answer would have been. We do not believe the court committed error in sustaining this objection whatever the witness would have answered. The witness had established a chain of custody for the evidence and testified that his chemical analysis showed it was cocaine. The defendant's cross-examination as to the nature of the analysis should have been made before the jury. It was not the judge's prerogative at a *voir dire* hearing to pass on the weight to be given to the analysis.

When Mr. McSwain testified before the jury and the defendant was cross-examining, he asked the following question as to a notation on the report: "All right. Now, I ask you if this report doesn't say 'Where Found or From Whom: Delivered from suspect.' Now you haven't heard anybody testify that that substance was delivered from my client at any time, had you?" The court properly sustained an objection to this question. It is obvious that this notation was placed on the report accompanying the substance as a part of the internal procedure of the State Bureau of Investigation. It was not germane to the guilt or innocence of the defendant. The defendant also says it was error to sustain an objection to a question asked Mr. McSwain as to whether the substance would have spilled if it had been replaced in an envelope without being folded. This question came at the end of a series of questions in regard to how the substance was placed in the envelope. It was repetitious and argumentative. Objection to it was properly sustained.

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The defendant excepted to seven rulings on questions asked Mr. Robertson on cross-examination. He makes all these exceptions a part of his fifth assignment of error. In his brief he says many of them were designed to show the inconsistency of the witness's testimony at the preliminary hearing and at the trial. We have examined each of the exceptions. Some of the questions are argumentative. Others are repetitious. The court allowed extensive cross-examination of the witness. We hold there was no error in limiting the cross-examination as was done by the court. The defendant's fifth assignment of error is overruled.

[5] In his sixth assignment of error the defendant contends there was not sufficient evidence for the court to find Mr. McSwain was an expert in chemical analysis. A person may qualify as an expert witness if "through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject." See 1 Stansbury's N.C. Evidence § 133 (Brandis rev. 1973). Mr. McSwain testified he had a B.S. degree in Chemistry from North Carolina State University, that he had ten years experience in analyzing subjects for chemical content, and he had attended several schools dealing with chemical analysis. We believe from this testimony the court could find that Mr. McSwain was better qualified than the jury to form an opinion as to the chemical content of the substance.

[6] Under his sixth assignment of error the defendant also brings forward an exception to the testimony of Mr. McSwain as to the results of the chemical analysis and the admission of the substance into evidence on the ground the State did not prove an unbroken chain of custody. See *State v. Cuthrell*, 50 N.C. App. 195, 272 S.E. 2d 616 (1980). Mr. Robertson testified he kept the evidence in his possession or in a locked cabinet until he mailed it to the State Bureau of Investigation Laboratory in a sealed envelope. Mr. McSwain testified he received the envelope, analyzed the contents, and mailed the substance in a sealed envelope to Mr. Robertson. Mr. Robertson testified he received the envelope and had kept it in his possession or in a locked cabinet since that time. We hold this is sufficient for the State to prove an unbroken chain of custody. The defendant's sixth assignment of error is overruled.

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[7] In his seventh assignment of error the defendant contends he was prejudiced by the judge's comments during the trial which amounted to an expression of an opinion by the court. We disagree. On numerous occasions, defense counsel asked argumentative questions, refused to give the witness time to answer questions, and argued with the district attorney. The remarks of the court to which the defendant assigns error either directed the defense counsel not to argue with the witness or the district attorney, to give the witness time to answer, or to proceed with his questions. In this we find no error. The defendant's seventh assignment of error is overruled.

[8] In his eighth assignment of error the defendant argues that his motion to dismiss should have been allowed on the ground that there was insufficient evidence to support his conviction of aiding and abetting in the sale of cocaine. Mr. Robertson testified that the defendant told him by telephone that he had retired but he had someone else to handle the business and would send someone else to pick him up. An automobile in which there was an unidentified female and Larry Blalock met Mr. Robertson and another person in the town of Norwood and carried them to the defendant's home. At that time defendant stated to Mr. Robertson that he did not handle cocaine any longer but someone else would handle it. Mr. Blalock stated to Mr. Robertson that he was the man he would deal with. The defendant lay on the couch in the living room while Robertson and Blalock got the cocaine from the birdhouse, returned to the living room and exchanged the \$1,200.00 in the presence of the defendant. We hold that from this evidence the jury could conclude that the defendant was at the scene with Mr. Blalock and ready to render assistance and encouragement to him in the sale of the cocaine, which presence and readiness to assist was known to Mr. Blalock. This would constitute aiding and abetting the sale of cocaine. See *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). The defendant's eighth assignment of error is overruled.

In his ninth assignment of error the defendant argues he was prejudiced by improper questions on cross-examination of the defendant's witnesses. Dean Lowder testified for the defendant that he was in the defendant's home when the defendant, Larry Blalock, Mr. Robertson, and another person came in. He testified further that he saw the defendant lying on the couch and did not

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take part in any transaction between the defendant and Mr. Robertson. On cross-examination he stated he never knew the defendant used the alias Michael Lee Folse. He was asked again over the objection of the defendant whether he knew the defendant used this alias and again he answered that he did not. Dean Lowder was then asked whether he had a passport to Columbia and Ecuador to which the witness answered that he did not. The court allowed the repetition of this question over the objection of the defendant to which the witness again answered in the negative. The witness then was asked whether he owed the defendant any money. He answered that he did not. The witness was asked this question again, and again he answered he did not. The court sustained an objection to the question when asked a third time. The defendant contends that by allowing these questions the prosecution was allowed to plant in the jury's mind the idea that defendant was a large drug dealer with connections in South America. We do not believe it was prejudicial error to allow this limited cross-examination.

Elwood Farmer testified as to the defendant's good character and reputation in the community. On cross-examination he was asked if he would change his opinion if he knew the defendant was selling cocaine. The defendant's objection to this question was sustained. We do not believe the defendant was prejudiced by this. The defendant's ninth assignment of error is overruled.

In his tenth assignment of error the defendant argues the prosecuting attorney made improper statements in his argument to the jury. In his closing argument the prosecuting attorney stated the defendant was wearing a \$300.00 suit, that "cocaine doesn't come from the United States . . . you know where it comes from," that the jury was the "conscience" of the community, and they "better bring back a verdict of guilty." The court sustained the defendant's objections to these statements and instructed the jury to disregard them. The court allowed the prosecuting attorney to argue over the objection of the defendant that the defendant was guilty and the defendant "and his crew" had been selling cocaine to the jury's children. We find no prejudicial error in the court's handling of the jury argument by the prosecuting attorney.

[9] In his eleventh assignment of error the defendant contends he was prejudiced by the court's recapitulation of the evidence.

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He argues that in the recapitulation, the court did not properly state his contentions. The court stated that the State contended the substance seized from the defendant was analyzed and found to be cocaine. The defendant argues the court should also have instructed the jury that the defendant contended the substance had been substantially altered and was in a materially different condition from the substance sent to the State Bureau of Investigation Laboratory in Raleigh. The defendant also contends it was error for the court to charge that the defendant invited Mr. Robertson into the house and stated to him that Blalock would sell him cocaine. The defendant did not call to the attention of the court these discrepancies in the evidence and what the defendant contends should have been recapitulated. We hold there was not reversible error in this failure of the court to charge on these contentions of the defendant.

[10] Before the jury began its deliberations the defendant requested that they be allowed to take to the jury room certain photographs, the warrant, and the bill of indictment. The court denied this motion. The defendant brings forward as his twelfth assignment of error this ruling of the court. The denial of this motion was within the discretion of the court. G.S. 15A-1233(b). This assignment of error is overruled.

[11] In his thirteenth assignment of error the defendant argues that it was error for the court to impose the maximum sentence of not more nor less than ten years and a fine of \$10,000.00. The defendant cites several cases which hold that it is reversible error for the court to consider irrelevant and improper matter in imposing a sentence. There is no evidence in the record that the court considered improper or irrelevant matter in imposing the sentence in this case. The defendant's thirteenth assignment of error is overruled.

In his fourteenth through seventeenth assignments of error the defendant contends the court should have allowed his motion for appropriate relief, allowed his motion to arrest the judgment, set aside the verdict, and granted his motion for a new trial. In his brief he states that each of these is a formal assignment of error to afford review of other assignments of error. We overrule assignments of error fourteen through seventeen.

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In his eighteenth assignment of error the defendant contends the court committed error in denying him an appearance bond pending his appeal. We hold the court did not abuse its discretion by denying the defendant an appearance bond. *See* G.S. 15A-536.

No error.

Judges WELLS and HILL concur.

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CHARLIE BEN GARNER, EMPLOYEE v. J. P. STEVENS AND COMPANY, INC.,  
EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 8110IC581

(Filed 16 March 1982)

**Master and Servant § 68—workers' compensation—occupational disease—cause of disability—remand for further evidence and findings**

Where the medical evidence tended to show that plaintiff suffered from the occupational disease byssinosis and from the non-occupational diseases arteriosclerosis, kyphosis and organic brain syndrome, but the evidence in the record was not sufficiently definite as to the cause of plaintiff's disability to permit effective appellate review, the cause must be remanded for further medical testimony and findings as to (1) whether the non-occupational diseases were aggravated or accelerated by plaintiff's occupational disease; (2) if so, the percentage of plaintiff's disability resulting from (a) his byssinosis and (b) his non-occupational diseases which were aggravated or accelerated by plaintiff's byssinosis; and (3) if plaintiff's non-occupational diseases were not aggravated or accelerated by his byssinosis, the portion of plaintiff's disability resulting from the occupational disease byssinosis.

Judge HEDRICK concurring in result.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and Award entered 20 January 1981. Heard in the Court of Appeals 4 February 1982.

Plaintiff filed a claim for workers' compensation benefits alleging that he is suffering from byssinosis, "an occupational disease caused by exposure to cotton dust." Deputy Commissioner Angela R. Bryant made findings of fact and conclusions of law and awarded compensation to plaintiff. Defendants appeal from the Full Commission's opinion and award which adopted and affirmed the deputy commissioner's opinion and award.

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**Garner v. J. P. Stevens and Co.**

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*Hassell, Hudson & Lore, by Charles R. Hassell, Jr. and Robin E. Hudson, for plaintiff-appellee.*

*Maupin, Taylor & Ellis, by Richard M. Lewis and David V. Brooks, for defendant-appellants.*

HILL, Judge.

The following facts found by Deputy Commissioner Bryant and affirmed by the Full Commission are pertinent to our decision:

3. Plaintiff's work and cotton dust exposure history are as follows:

[ (a) October 5, 1939 to April 17, 1953

Roanoke #2 Mill of defendant employer; plaintiff was a laborer and scrubber and worked in the picker room, card room, spinning room, weave room and supply room while the mill was running. Cotton was processed in this mill at all times during this period. As a scrubber, plaintiff scooped up water as another worker ran a machine that cleaned the floors. The air in the picker room and card room was dusty with cotton dust in the air. Cotton dust blew off the machine in the areas where plaintiff scrubbed floors. The floors had been swept prior to plaintiff's scrubbing. Plaintiff was exposed to respirable cotton dust. The card room air was the dustiest and the air appeared foggy.]

....

(d) May 25, 1953 to January 26, 1970

Roanoke #1 Mill of defendant-employer; plaintiff was a sweeper in the spinning department. The mill processed cotton at all times during this period. Plaintiff swept the cotton dust and waste off the floors, blew off frames, spoolers and winders. Plaintiff picked up the cotton dust and waste by hand with a broom, bagged it and took it to the waste house. The air was dusty and linty with cotton dust most of the time. Sometimes plaintiff ran the elevator to go to the card



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room and bring bagged cotton waste down and to haul cotton filling to the weave room and slasher room.

[Plaintiff swept most of the time. The air was extremely dusty when plaintiff blew off a certain number of frames once or twice in eight hours. Plaintiff was exposed to respirable cotton dust during this period of his employment with defendant-employer.]

. . . .

[(e) January 26, 1970

Plaintiff stopped work because of his breathing problems and was totally and permanently disabled as a result of arteriosclerosis and byssinosis. Plaintiff did not retire until January 26, 1971 because he was hoping to get better and return to work, but he was not able to do so.]

. . . .

6. On April 18, 1970, plaintiff was hospitalized by Dr. Frazier for chronic lung disease and arteriosclerotic heart disease with congestive heart failure. Plaintiff's breathing problems became progressively worse from this point. Plaintiff's nose and throat would get stopped up at night and plaintiff had to sit up until the symptoms, including chest tightness eased and until plaintiff would cough up sputum.]

. . . .

9. Plaintiff suffers air flow obstruction and a limitation of his ability to improve oxygenation with exercise. Plaintiff overbreathes at rest. Plaintiff suffers from kyphosis (increase in chest diameter) because of overinflation from the lung disease and because of spine curvature with aging. Plaintiff also suffers from generalized arteriosclerosis with involvement of circulation to the head.]

[12. Plaintiff was as of January 26, 1970 and remains totally and permanently disabled as a result of byssinosis and arteriosclerosis.]

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[13. Plaintiff's byssinosis was caused by his exposure to respirable cotton dust in his employment with defendant-employer as detailed in paragraph three above.]

From these facts, the deputy commissioner concluded that plaintiff contracted byssinosis "as a result of exposure to cotton dust in his employment with defendant-employer," and that plaintiff is entitled to "compensation for total disability from January 26, 1970 for a period of 400 weeks at the rate of \$50.00 per week and in no event shall the total compensation paid exceed \$18,000.00."

Our scope of review in this matter is defined as follows:

Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding of fact. [Citations omitted.] The appellate court does not retry the facts. It merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact.

*Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E. 2d 458, 463 (1981). *Accord, McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E. 2d 175 (1981). "In making its findings, the Commission's function is 'to weigh and evaluate the entire evidence and determine as best it can where the truth lies.'" *Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E. 2d 830, 835, *disc. rev. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980) (emphasis original). The Industrial Commission is the sole judge of the witnesses' credibility and may choose to believe all, a part, or none of any witnesses' testimony. *Id.*; *Morgan v. Thomasville Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968).

We find sufficient evidence in the case *sub judice* to support the findings of fact. On the critical issue of causation, Dr. Herbert Otto Sieker testified that plaintiff suffers from arteriosclerosis, byssinosis, kyphosis, and organic brain syndrome. There is evidence, mirrored in Finding of Fact No. 9, that plaintiff's byssinosis has aggravated his kyphosis. Dr. Sieker explained that changes in plaintiff's air flows were due to an overinflated chest, caused by "obstructive lung disease" and kyphosis. "Kyphosis,"

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he stated, "is often seen in conjunction with chronic obstructive lung disease." In addition, there is evidence that plaintiff's lung dysfunction would detrimentally affect his arteriosclerosis.

Dr. Sieker's medical report concluded as follows:

It appears that much of his disability is due to his cardiovascular disease. Certainly historically, the cotton dust exposure appeared to cause respiratory symptoms at the time that the patient worked in the mills, but I do not think it is possible to say he is disabled on the basis of chronic obstructive lung disease due to cotton dust exposure.

However, he testified that "cotton dust exposure appeared to cause respiratory symptoms and this could contribute to the obstructive lung disease which this patient shows." Dr. Sieker concluded that plaintiff is "not disabled *on the basis of lung disease exclusively*," but that plaintiff's arteriosclerosis and organic brain syndrome are contributing factors. (Emphasis added.)

In sum, this evidence tends to show that only plaintiff's byssinosis is an occupational disease; his arteriosclerosis, kyphosis, and organic brain syndrome therefore appear to be "ordinary diseases of life to which the general public is equally exposed outside of the employment," non-occupational in origin. G.S. 97-53(13). Cf. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982); *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E. 2d 837 (1982); *Fraday v. Groves Thread Co.*, 56 N.C. App. 61, 286 S.E. 2d 844, *disc. rev. allowed*, 305 N.C. 585, 292 S.E. 2d 570 (1982).

Since the opinion and award of the Full Commission was entered, the following rules have been promulgated and now apply to these facts:

When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

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When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

*Morrison v. Burlington Industries*, *supra* at 18, 282 S.E. 2d at 470 (emphasis original).

In light of the *Morrison* rules, it specifically must be found if plaintiff's occupational disease, byssinosis, aggravated or accelerated any of the existing maladies not attributable to his employment; or, if such aggravation or acceleration did not occur, what portion of plaintiff's disability is due to the occupational disease. As in *Hansel v. Sherman Textiles*, 304 N.C. 44, 55, 283 S.E. 2d 101, 107 (1981), the medical evidence in the record *sub judice* is insufficient to make such findings "on the cause of plaintiff's disability to permit effective appellate review." Thus, the record must be supplemented by additional medical testimony to indicate answers to the following questions:

(1) Were the non-occupational diseases aggravated or accelerated by plaintiff's occupational disease, byssinosis?

(2) If so, what percentage of plaintiff's disability results from (a) his byssinosis, and (b) his non-occupational diseases which were aggravated or accelerated by plaintiff's byssinosis?

(3) If plaintiff's non-occupational diseases were not aggravated or accelerated by his byssinosis, what portion of plaintiff's disability results from the occupational disease, byssinosis?

*See generally Hansel v. Sherman Textiles, supra.*

The present findings of fact are supported by the evidence and must be affirmed. However, since they now are insufficient to enable this Court to determine the rights of the parties in this matter, the cause must be remanded to the Industrial Commission to re-examine the medical witness, elicit the answers to the ques-

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tions posed above, and make additional findings of fact and conclusions of law upon which to base an opinion and award. Because of this result, we choose not to address plaintiff's cross-assignments of error at this time.

Thus, we affirm the present findings of fact, vacate the conclusions of law, and direct that the cause be remanded in accordance with the above directives.

Affirmed in part; vacated in part; and remanded.

Judge BECTON concurs.

Judge HEDRICK concurs in the result.

Judge HEDRICK concurring in result.

Since the majority opinion affirms the "present findings of fact" and vacates the "conclusions of law," and because the meaning of these expressions is illusory, I feel compelled to attempt to explain my decision. Whether labelled a finding or conclusion, the Commission clearly concluded that plaintiff suffered an occupational disease. This conclusion is supported by the findings which are supported by the evidence. Findings of fact numbers 3, 6, 9, and 13 are supported by the evidence. Finding of fact number 12, insofar as it purports to conclude that plaintiff is "totally and permanently disabled as a result of byssinosis and arteriosclerosis," is not supported by either the findings of fact or the evidence, and was apparently vacated by the majority opinion. Whether plaintiff was disabled to any extent by his occupational disease is a necessary conclusion to be drawn from the findings of fact. The Commission only obliquely, if at all, made such a finding or conclusion. Such a finding or conclusion is, in my opinion, not supported by either the testimony or report of Dr. Seiker, simply because Dr. Seiker throughout his testimony and his report related his opinion with respect to plaintiff's disability to both his occupational and nonoccupational diseases. When Dr. Seiker was asked specifically whether plaintiff would be disabled because of the occupational disease if he did not have "organic brain syndrome or any heart problem," he replied,

Well, he would be limited in his ability to do heavy work or work which requires strenuous or sustained exercise. That I

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would expect that he could carry on modest activity or sedentary kinds of jobs.

If I had seen Mr. Garner in 1970 when he retired, based on the history up that point of 1970, when he was having shortness of breath and found it difficult to work and with the history that he was better away from work, I think it would only be reasonable to recommend that he stop exposing himself to the environment that had caused his symptoms. I would have asked that he get out of the cotton dust because when he was in it he had cough and shortness of breath and wheezing.

The last sentence of my report reads "I do not think it is possible to say he is disabled on the basis of chronic obstructive lung disease due to cotton dust exposure." I think that statement is correct. . . .

The majority remands the case to the Commission to "re-examine the medical witness, elicit the answers to the questions posed above, and make additional findings of fact and conclusions of law upon which to base an opinion and award." Because Dr. Seiker's testimony and report is so equivocal with respect to whether plaintiff was disabled as a result of his occupational disease, he should be given an opportunity, if not required, to be more definitive with respect to whether plaintiff is disabled by his occupational disease before the witness is required to answer the specific questions posed in the majority opinion. Since the majority has vacated all conclusions of law, the Commission, in my opinion, is not precluded from finding and concluding that plaintiff's disability does not result from his occupational disease, nor is the Commission precluded from finding and concluding that the occupational disease did not aggravate or accelerate the nonoccupational diseases.

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**STATE OF NORTH CAROLINA v. GERALD BROWN**

No. 818SC761

(Filed 16 March 1982)

**1. Criminal Law § 113.1— recapitulation of evidence— errors immaterial**

Errors in the trial judge's recapitulation of the evidence to the jury were not prejudicial where he summarized one witness's testimony as being that he had first seen defendant on a certain day when in fact he had known defendant for an undetermined period, and where another witness's testimony was not summarized at all to the jury. It was clear to the jury that the first witness had not seen defendant during the time in which an alleged drug sale took place, regardless of the actual length of the witness's acquaintanceship with defendant, and the second witness's testimony was not exonerative but merely served to impeach the credibility of another witness.

**2. Criminal Law § 66.9— photographic identification— no suggestiveness in procedure— in-court identification of independent origin**

The trial court did not err in its conclusions that a pretrial photographic identification procedure was not unnecessarily suggestive or conducive to mistaken identification, and that an in-court identification of defendant was of independent origin where (1) a deputy conversed with defendant for four or five minutes, from a distance of between one and two feet, (2) lighting conditions were good, (3) the deputy could see defendant clearly and concentrated on his features so he could identify him later, (4) the deputy made notes of the transaction, which included a description of defendant, (5) the deputy picked defendant's photograph from a series of ten photographs which were of people from whom he had bought drugs, (6) there were no names or identifying markings on the photographs, and (7) the deputy was able to retain a mental image of the facial features of defendant until he saw defendant in the courtroom.

**3. Constitutional Law § 50— delay in prosecution— failure to show intent by State**

Where defendant claimed that he was prejudiced by an intentional three-month delay in commencing prosecution, he failed to allege or make any showing that the State delayed his indictment in order to weaken his ability to defend himself. Even had defendant suffered prejudice by the delay, he failed to show any intent on the part of the State to impair his defense.

**4. Criminal Law § 111.1— instructions on identification— sufficient**

The trial court did not commit reversible error by its failure to instruct the jury that a witness's identification of defendant as the perpetrator of the offense must have been the product solely of his recollection as (1) the case exhibited none of the special difficulties often presented by identification testimony that would require additional information, (2) the attention of the jury was sufficiently focused on the issue of identity without the omitted instructions, (3) the Pattern Jury Instruction was not requested by defendant,

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and (4) the witness made an unqualified identification of defendant from a photographic array and at trial.

APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 8 April 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 6 January 1982.

Defendant was indicted for the felonious possession of marijuana with intent to sell and felonious sale and delivery of marijuana.

The evidence adduced at trial tended to show that Craven County Deputy Sheriff Cornelius L. Fletcher was working with the Lenoir County Sheriff's Department and the Kinston Police Department in an undercover capacity on 17 October 1980. At approximately 9:00 p.m., Fletcher was at the parking lot of the Eagle Taxi Stand in Kinston. He was approached by an individual identified as the defendant. Defendant asked Deputy Fletcher if he wanted to buy any marijuana. Fletcher bought two envelopes of marijuana from defendant. Deputy Fletcher was the only witness to the alleged sale.

Approximately six to eight weeks after the sale, Deputy Fletcher picked defendant's photograph from a photographic array containing likenesses of people previously charged with criminal offenses, from whom Deputy Fletcher had bought either drugs or alcohol. The trial court found on voir dire that the pretrial identification procedure was not unnecessarily suggestive and did not taint Fletcher's in-court identification.

Defendant testified that on the day of the alleged sale he had worked as a wall plasterer. He came home after work, took a shower and ate, then went out. He said that he had plans to meet Ella Burney at a local club at about 10:00 or 10:30 p.m. He was attired in a grey suit and black leather overcoat. Miss Burney met defendant at about 10:00. She corroborated his testimony as to how he was dressed that evening.

Defendant appeals from convictions of felonious possession of marijuana with intent to sell and deliver and of felonious sale and delivery of marijuana, and a judgment of imprisonment.



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*Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.*

*Attorney General Edmisten, by Associate Attorney Barry S. McNeill, for the State.*

MORRIS, Chief Judge.

[1] Defendant assigns error to the trial court's summary of defendant's evidence, alleging material misstatements of the testimony of William Dudley, owner and operator of the Eagle Taxi Stand, and omission of Ella Burney's testimony. Defendant asserts that the jury could have inferred from such irregularities that the judge expressed an opinion, rendering the summary prejudicial. We disagree.

"It is well settled in this jurisdiction that in determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." *State v. Wright*, 302 N.C. 122, 127, 273 S.E. 2d 699, 703 (1981). When reviewed contextually, it is evident that the trial judge's charge included an even recapitulation of the evidence presented by both defendant and the state. The trial court abbreviated the testimony of defendant's witness, Dudley, as follows:

Mr. William K. Dudley testified that he owns and operates the Eagle Taxi Stand and was operating it on October 17, 1980, and that he is there most of the time and he knows that the lights were very bad around that company on October 17, 1980; that the city has installed one or more lights around there within the past two months but that did not exist on October 17, 1980; that yesterday was the first time that he has ever seen the defendant and that he knows most of the people who are there, at least knows them by face and he's never seen the defendant before yesterday.

In fact, Dudley testified that he had known defendant for an undetermined period but that the first time he saw defendant near the taxi stand was the day before the trial. We deem the trial judge's misstatement immaterial, since the judge accurately recalled that Dudley testified he had not seen defendant at the taxi stand until the day before trial. The defendant has the

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burden of proving an improper expression of opinion and that such an expression was prejudicial. *State v. Green*, 268 N.C. 690, 151 S.E. 2d 606 (1966). Defendant has failed to make such a showing. It must have been clear to the jury after the instructions were given that Dudley had not seen defendant at the stand during the time period in which the alleged drug sale took place, regardless of the actual length of Dudley's acquaintanceship with defendant.

Nor was there prejudicial error in the trial judge's omission of Miss Burney's testimony from his summary. The law does not require recapitulation of all the evidence in the charge of the court to the jury. The judge is required to state the evidence only to the extent necessary to explain the application of the law to the evidence. *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). Miss Burney said that she met defendant at approximately 10:00 on 17 October, but did not know his whereabouts prior to that time. She otherwise corroborated defendant's recollection of what he was wearing that evening. Her testimony was, therefore, not exonerative, but merely served to impeach the credibility of Fletcher. Since the testimony of neither Dudley nor Miss Burney was "substantive evidence which would exculpate defendant, the trial judge was not required to summarize this evidence in order to explain and apply the law to the evidence in this case." *State v. Adcox*, 303 N.C. 133, 141, 277 S.E. 2d 398, 403 (1981).

Furthermore, the record fails to show that any misstatement or omission in the court's summary of the evidence was brought to the attention of the court prior to the jury's retiring. In this case, as in the matter of *State v. McCoy*, 34 N.C. App. 567, 239 S.E. 2d 300 (1977), "the defendant contends that the trial judge erred in his charge to the jury by relating the evidence in such a way as to convey an opinion that he favored the State." *Id.* at 569, 239 S.E. 2d at 302. We held in *McCoy* that "[a] misstatement of the evidence, which is not called to the attention of the trial judge, may not be the basis for a proper assignment of error." *Id.* at 570, 239 S.E. 2d at 302. Defendant's dereliction in bringing the misstatement and omission of evidence to the attention of the court, his failure to show prejudice, the nonexculpatory nature of the testimony, and the court's issuance of cautionary instructions, require dismissal of this assignment of error.

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[2] Defendant next assigns error to the ruling of the trial court regarding the pretrial identification procedures and subsequent in-court identification on the grounds that the photographic identification procedure was suggestive and that the evidence was insufficient to support the trial court's findings of fact and conclusions of law, and its ruling that the in-court identification was of independent origin.

The issue in evaluating a pretrial photographic identification procedure is whether the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Legette*, 292 N.C. 44, 51, 231 S.E. 2d 896, 900 (1977), quoting *Simmons v. U.S.*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968).

Factors to be considered in evaluating the likelihood of mistaken identification include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at confrontation, and (5) the length of time between the crime and the confrontation.

*State v. Dunlap*, 298 N.C. 725, 732, 259 S.E. 2d 893, 896-97 (1979); *State v. Legette*, supra at 51. The record discloses that Deputy Fletcher was shown an array, consisting of ten photographs. Eight of the photographs depicted young black males; one likeness was of a white male, and one was of a black female. Deputy Fletcher was told that the photographs were of people from whom he had bought drugs, but no one suggested to Fletcher which photograph he should choose, and there were no names or identifying markings on the photographs. The fact that Deputy Fletcher may have recognized others in the array does not make the proceeding so suggestive as to require exclusion of the identification testimony. His familiarity with the individuals depicted "is not in and of itself evidence of a lack of over-all fairness," *U.S. v. Sherman*, 421 F. 2d 198, 200 (4th Cir.), cert. denied, 398 U.S. 914, 26 L.Ed. 2d 78, 90 S.Ct. 1717 (1970), but is only one factor to be considered in determining whether the procedure is suggestive. There is nothing to indicate that the collection of photographs or the manner in which they were displayed was unduly suggestive or contributed to Deputy Fletcher's selection of defendant's photograph.

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Based on his observations in the taxi stand lot, the deputy identified defendant's photograph as depicting the person who sold him marijuana on 17 October. Several facts confirm the reliability of his identification. Deputy Fletcher conversed with defendant for four or five minutes, from a distance of between one and two feet. Lighting conditions were good, there being a light at the taxi stand and a street light within 20 or 25 feet. Deputy Fletcher testified that he was able to see defendant clearly and that he concentrated on defendant's features so that he could identify him later. He made notes of the transaction, which included a description of defendant. He described defendant's face, hair style, and clothing with particularity. Deputy Fletcher picked defendant's photograph from the array, despite some changes in defendant's appearance after the photograph was made. Six to eight weeks elapsed between the crime and the pretrial identification procedure, but this time span was not so lengthy as to negate the reliability of Deputy Fletcher's identification. See *State v. Fate*, 38 N.C. App. 68, 247 S.E. 2d 310 (1978).

There is, moreover, sufficient evidence in the record to show that Deputy Fletcher's in-court identification had a basis independent of the photographic identification procedure. It was shown that Deputy Fletcher had a good opportunity to view defendant at the time of the sale. There is no discrepancy between his description given before the pretrial identification procedure and the description he gave on the stand. He identified no other person. Finally, he stated that "I was in the presence of the individual . . . about three or four minutes. . . . I was able to see and observe the facial features of the individual. . . . I was able to form a mental image of those features. I have been able to retain that mental image and the facial features of the individual . . . until this date. . . . I see the person in the courtroom today. That person is the defendant."

We hold that the facts found by the trial court are supported by the evidence, that the facts found support the conclusions made, and that the trial court did not err in its conclusions that the pretrial photographic identification procedure was not unnecessarily suggestive or conducive to mistaken identification, and that the in-court identification of defendant was of independent origin.

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State v. Brown

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[3] Defendant contends that the trial court erred by denying defendant's motion to dismiss for delay in commencing the prosecution. He claims that he was prejudiced by an intentional three-month delay because he was unable, due to the passage of time, to locate witnesses. Defendant, however, has failed to allege or make any showing that the state delayed his indictment in order to weaken his ability to defend himself.

. . .

[F]or a defendant to carry the burden on his motion to dismiss for preindictment delay violating his due process rights pursuant to the Fifth and Fourteenth Amendments, he must show both actual and substantial prejudice from the preindictment delay *and* that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant.

*State v. Davis*, 46 N.C. App. 778, 782, 266 S.E. 2d 20, 23, *cert. denied*, 301 N.C. 97 (1980), citing *U.S. v. Lovasco*, 431 U.S. 783, 52 L.Ed. 2d 752, 97 S.Ct. 2044, *rehearing denied*, 434 U.S. 881, 54 L.Ed. 2d 164, 98 S.Ct. 242 (1977). Defendant maintains only that the delay in the case at bar was intentional in order to avoid revealing the identity of Deputy Fletcher. Even had defendant suffered prejudice by the delay, he has failed to show any intent on the part of the state to impair his defense. This assignment of error is, therefore, overruled.

[4] By his final assignment, defendant contends that the trial court committed reversible error by its failure to instruct the jury that Deputy Fletcher's identification of defendant as the perpetrator of the offense must have been the product solely of his recollection, derived only from observations made at the time of the drug sale. The court instructed on the identification issue as follows:

Now, ladies and gentlemen of the jury, I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crimes charged. This means that you, the jury, must be satisfied beyond reasonable doubt that the defendant was the perpetrator of the crimes charged before you may return a verdict of guilty. The main aspects of identification are the observations of the offender by the

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witness, Mr. Fletcher at the time of the crime offense. In examining the testimony of the witness as to his observations of the perpetrator at the time of the crimes, you should consider all the relevant facts, including the capacity of the witness to make an observation through his senses, the opportunity the witness had to make an observation and such details as the lighting at the scene of the crimes at the time, the mental and physical condition of the witness, the length of time of the observation, and any other condition or circumstances which might have aided or hindered the witness in making the observation. The identification witness is a witness just like any other witness; that is you shall assess the credibility of the identification witness in the same way you would with any other witness in determining the adequacy of his observation and his capacity to observe. As I have instructed you earlier the State must prove beyond a reasonable doubt that the defendant was the perpetrator of the crimes charged. If after weighing all the testimony you are not satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crimes charged, it would be your duty to return a verdict of not guilty as to all charges.

Defendant contends, as did the defendant in *State v. Martin*, 53 N.C. App. 297, 280 S.E. 2d 775 (1981), that the trial judge should have included the following portion of the North Carolina Pattern Jury Instructions—Criminal, § 104.90, on identification:

However, your consideration must go further. The identification of the defendant by the witness as the perpetrator of the offense must be purely the product of the witness' recollection of the offender and derived only from the observation made at the time of the offense. In making this determination you should consider the manner in which the witness was confronted with the defendant after the offense, the conduct and comment of the persons in charge of the (described procedure) and any circumstances or pressures which may have influenced the witness in making an identification, and which cast doubt upon or reinforced the accuracy of the witness' identification of the defendant.

We find, as we did in *Martin*, that "this case 'exhibits none of the special difficulties often presented by identification testimony

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that would require additional information be given to the jury in order for us to repose confidence in their ability to evaluate the reliability of the identification.' " *Id.* at 301, 280 S.E. 2d at 778, quoting *State v. Lang*, 46 N.C. App. 138, 145, 264 S.E. 2d 821, 826, *rev'd. on other grounds*, 301 N.C. 508, 272 S.E. 2d 123 (1980).

The instruction on identification given in this case was very much like the instruction given in *Martin*, in that it addressed the question of identification, the state's burden of proving the identity of the perpetrator, the factors to be considered in determining the reliability of the witness' identification testimony, and reasonable doubt. "The attention of the jury, therefore, was sufficiently focused on the issue of identity without the omitted instructions." *State v. Martin, supra* at 301, 280 S.E. 2d at 778. Further, the pattern jury instruction or its substantial equivalent was not requested by defendant. *Id.* Finally, Fletcher made an unqualified identification of defendant from the photographic array and at trial. Therefore, even though the court omitted a portion of N.C.P.I.—Criminal, § 104.90, the charge, when viewed as a whole, was sufficient on the issue of identification.

In the trial of defendant, we find

No error.

Judges HEDRICK and MARTIN (Robert M.) concur.

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JAMES J. RORIE, GUARDIAN AD LITEM FOR CHICO RORIE, MINOR SON, RACHEL L. RORIE, DECEASED, EMPLOYEE PLAINTIFF v. HOLLY FARMS POULTRY COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER DEFENDANTS

No. 8110IC398

(Filed 16 March 1982)

**1. Master and Servant § 57— workers' compensation—interpretation of "willful intent to injure another"**

In workers' compensation proceedings, a finding of premeditation coupled with an initial assault intending serious injury is necessary to support a conclusion that a plaintiff's recovery is barred by her willful intent to injure another. Therefore, where decedent and another employee worked together in

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a poultry processing plant, a dispute arose, decedent deliberately pursued the other employee into a parking lot after announcing sometime earlier that they would settle their differences "once and for all," and where a struggle ensued and a knife was produced which was used to stab decedent to death, the Commission's failure to make a finding that decedent's action constituted an initial assault of a grave and aggravated nature precluded a conclusion that plaintiff's recovery was barred. G.S. 97-12(3).

**2. Master and Servant § 56— workers' compensation—fight between employees—proximate cause**

In a workers' compensation proceeding in which decedent died as a result of multiple stab wounds inflicted upon her after she engaged in a fight with another employee, it was not sufficient for the Industrial Commission to find that decedent's actions were such as to have merely contributed to her injury and death. Rather, the Industrial Commission should have reached a conclusion as to whether decedent's willful intent to injure another employee was the sole proximate cause of her death. Under G.S. 97-12(3) the party seeking an exemption under the statute must prove that the claimant's willful intent to injure was the sole proximate cause of the injury or death in question.

Judge ARNOLD dissenting.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 29 August 1980. Heard in the Court of Appeals 20 November 1981.

This appeal arises out of a stabbing death which took place in the parking lot of defendant employer's poultry processing plant. The deceased, Rachel L. Rorie, worked in the employer's labeling department, as did Beverly Thompson. There was evidence that personal animosity existed between Rachel and Beverly based to some extent on Rachel's belief that Beverly was intentionally causing boxes travelling down a conveyor belt to "jump the chute" and hit Rachel. There was testimony that on the evening of 19 April 1979, Rachel had been hit by one of the boxes and the two women exchanged angry words. At the end of the shift shortly after midnight, Rachel preceded Beverly out of the work area, stopped in front of her, and challenged that they were going "to settle this once and for all." Rachel approached Beverly again outside on the steps of the building and the two continued to exchange angry words as they walked to the parking lot. One of Rachel's friends urged her to avoid a confrontation. When Beverly reached her car she opened the door, threw her purse and wrap inside, closed the door, then turned and faced Rachel. A pushing match ensued. A knife "was produced." It "ended up" in



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Beverly's hand and she stabbed Rachel at least ten times, causing her death.

Beverly testified that Rachel "came down at me with a knife. I reached for it and, you know, we was real close on each other." Other witnesses testified that Beverly was holding a knife behind her back while the two women were arguing on the steps of the building and that Beverly pushed Rachel first.

This action was brought before the Industrial Commission asking that compensation be awarded in the form of death benefits. The deputy commissioner concluded as a matter of law that although the accidental death arose out of and in the course of the employment, "no compensation shall be payable, however, because the death was proximately caused by wilful intention of decedent to injure another." In a two-to-one vote, the full Commission upheld the opinion of the deputy commissioner.

*F. D. Poisson, Jr. and Larry E. Harrington for plaintiff appellant.*

*Hedrick, Feerick, Eatman, Gardner and Kincheloe, by Philip R. Hedrick and Hatcher B. Kincheloe, for defendant appellees.*

MARTIN (Harry C.), Judge.

This is a case of first impression, necessitating a construction of N.C.G.S. 97-12(3), which reads: "No compensation shall be payable if the injury or death to the employee was proximately caused by: . . . (3) His willful intention to injure or kill himself or another." We are asked on this appeal to consider whether Rachel Rorie's actions prior to her death constituted evidence of a willful intention to injure Beverly Thompson, and if so, whether this intent proximately caused her death. We will deal with each issue separately.

WILLFUL INTENT TO INJURE ANOTHER

[1] As this Court has not had occasion to interpret the words "willful intent to injure another," we find it instructive to examine the case law from other jurisdictions which have interpreted similar provisions. The parties would apparently adopt, without disagreement, the interpretation afforded by these cases as set forth in 1 A. Larson, *The Law of Workmen's Compensation* § 11.15(d) (1978).

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"The words 'wilful intent to injure' obviously contemplate behavior of greater deliberateness, gravity and culpability than the sort of thing that has sometimes qualified as aggression." *Id.* at 3-184. Courts in other jurisdictions have considered two factors in reaching a decision that "the willful intent to injure another" defense will preclude recovery. The first is the premeditative character of the assault. The second is the seriousness of the claimant's initial assault; that is, whether there was a reasonable expectation of bringing about real injury. Mere verbal abuse would not give rise to the defense of intent to injure. "Profanity, scuffling, shoving, rough handling or other physical force not designed to inflict real injury do not satisfy this stern designation." *Id.* at 3-188.

The evidence in the record would support a finding that Rachel did not act impulsively. She deliberately pursued Beverly into the parking lot after announcing sometime earlier that they would settle their differences "once and for all." However, the Commission failed to make a finding that Rachel Rorie's actions constituted an initial assault of a grave and aggravated nature. "[T]here must be 'an easily perceptible danger of *substantial bodily harm or death* and a great chance that such harm will result.'" *Id.* at 3-190 (emphasis ours). The Commission was able to find only that "Rachel got right up into Beverly's face and pinned her against the car. Beverly pushed Rachel from her. A knife was produced at this point by one of the combatants. The knife ended in Beverly's hands. It was used by her to stab Rachel to death." Therefore, absent a showing that Rachel either produced a knife, struck the first blow, or in some other way clearly manifested an intent to inflict serious injury upon Beverly, the defense should not be available. We hold that a finding of premeditation coupled with an initial assault intending serious injury is necessary to support a conclusion that a claimant's recovery is barred by her willful intent to injure another. This the Commission failed to do.

## PROXIMATE CAUSE

[2] The second question presented by this appeal is whether Rachel Rorie's death was proximately caused by her willful intent to injure Beverly Thompson. Plaintiff would have us adopt the reasoning in *Inscoe v. Industries, Inc.*, 30 N.C. App. 1, 226 S.E. 2d 201 (1976), *aff'd on other grounds*, 292 N.C. 210, 232 S.E. 2d 449

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(1977). In *Inscoc* this Court held that under former N.C.G.S. 97-12 a claimant's intoxication would preclude recovery only if it was the sole proximate cause of the injury. Under this statute the General Assembly had provided that "[n]o compensation shall be payable if the injury or death *was occasioned by* the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." N.C. Gen. Stat. § 97-12 (1972) (emphasis ours). The present language of the statute was the result of a 1975 amendment to the Act and was therefore written without the benefit of the *Inscoc* decision. Thus we find no support for defendants' contention that the legislative decision to change the "occasioned by" language to "proximately caused by" was an effort to frustrate the holding in *Inscoc*.

We approve of both the reasoning and the conclusion in *Inscoc*, and hold that under N.C.G.S. 97-12(3) the party seeking an exemption under the statute must prove that the claimant's willful intent to injure was the sole proximate cause of the injury or death in question. This holding is in accord with the purposes of the compensation statute. As stated in *Inscoc*:

We are of the opinion that a critical reading of our Workmen's Compensation law and a careful review of case law interpreting similarly worded statutes from other states support our conclusion that benefits under the Act should be foreclosed only when the evidence shows that the claimant's intoxication was *the sole cause* of the accident and not simply a factor from which the causal acts ultimately arose.

. . . " . . . the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery.' " . . . Workmen's Compensation is a law designed to eliminate certain common law barriers to recovery and the " . . . various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof shall not be denied upon technical, narrow and strict interpretation.' "

30 N.C. App. at 8, 226 S.E. 2d at 205 (citations omitted). Moreover, this decision is supported by the fact that where retaliatory force is excessive or where the original aggressor has withdrawn, the defense is not available. See *Landry v. Gilger Drilling Company*, 92 So. 2d 482 (La. App. 1957).

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The Industrial Commission did not find as a fact or conclude as a matter of law that Rachel Rorie's willful intent to injure Beverly Thompson was the sole proximate cause of her death. Rachel died as the result of multiple stab wounds inflicted upon her, force clearly excessive under the facts of this case. It is not sufficient that the claimant's actions are such as to merely contribute to her injury or death as to do so "would virtually read 'fault' as negligence back into the statute in its broadest and most devastating sense." *Inscoc, supra*, at 9, 226 S.E. 2d at 206.

Our opinion today interpreting N.C.G.S. 97-12(3) is consistent with the fundamental policy and purposes of the Workers' Compensation Act, among which are to remove the concept of fault as the basis of liability and to prevent the dependency of the claimant and his family. *Hartley v. Prison Department*, 258 N.C. 287, 128 S.E. 2d 598 (1962). Thus any provision in the Act precluding recovery should be strictly construed and its application carefully guarded. In the application of N.C.G.S. 97-12(3), there is a strong presumption that the injury or death was not caused by the claimant's willful intent to injure another, the burden being on the defendants to prove otherwise. This burden is not met by merely offering evidence that the claimant precipitated an argument, used "fighting words," or otherwise "goaded" a fellow worker into striking the first blow.

Upon applying the foregoing to the facts of this case, we hold that defendants have failed to prove that Rachel's death comes within the meaning of N.C.G.S. 97-12(3). The decision of the Commission is vacated and the cause remanded to the Commission for the entry of a decision consistent with this opinion.

Vacated and remanded.

Judge WELLS concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

I dissent. G.S. 97-12(3) in my view does not require a finding that there be premeditation and an initial assault. It simply requires a finding to support the wording of the statute that there

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be a “. . . willful intention to injure . . . another.” In this case there was more than mere evidence that the claimant precipitated an argument by “fighting words” or otherwise “goading” a fellow worker. Rachel threatened Beverly several times, saying that she was “going to get Beverly,” that “that was the last time” Beverly would let a box fall on her, and that “once and for all” she was going to “settle” with Beverly. Rachel then pursued Beverly to Beverly’s car, and evidence supports the Commission’s finding that she then “pinned” Beverly against the car.

Moreover, in rewriting G.S. 97-12 the General Assembly provided that a claimant could not recover for an injury or death “proximately caused by,” among other things, a willful intent to injure. I do not agree that the *Inscoc* decision requires us to amend the statute by reading in it a requirement that the claimant’s intent to injure must be the “sole proximate cause.”

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DIANNE HOLLEY, INDIVIDUALLY AND AS GUARDIAN OF THE ESTATE OF ERVIN LEE HOLLEY, INCOMPETENT v. BURROUGHS WELLCOME CO., A NORTH CAROLINA CORPORATION, AND AYERST LABORATORIES, A DIVISION OF AMERICAN HOME PRODUCTS CORPORATION

No. 8114SC694

(Filed 16 March 1982)

**1. Attorneys at Law § 2— foreign attorney—admission to practice for limited purpose—statement by client**

In order for an out-of-state attorney to be admitted to limited practice in the courts of this State, the client’s statement required by G.S. 84-4.1(2) must be attached to the attorney’s motion, and this requirement cannot be met by substituting the statement of North Carolina counsel.

**2. Attorneys at Law § 2— foreign attorney—admission to practice for limited purpose—status as “practicing attorney”**

A declaration by an out-of-state attorney that he is a member in good standing of the Bar of another state and is duly licensed and admitted to practice in that state is sufficient to meet the requirement of G.S. 84-4.1(1) that he set forth his status as a “practicing attorney” in the other state.

**3. Attorneys at Law § 2— foreign attorney—motion for admission to practice for limited purpose—failure to meet statutory requirements—no exercise of court’s discretion**

Where the trial court found that the affidavit of an out-of-state attorney did not meet the requirements of G.S. 84-4.1 for admission to practice for a

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limited purpose, the court erred in denying the attorney's application in the exercise of its discretion but should have ruled as a matter of law, in which case plaintiff could have requested leave to amend and correct the deficiencies found by the trial court.

APPEAL by plaintiff from *Bailey, Judge*. Order entered 14 April 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 March 1982.

Plaintiff brought an action for loss of consortium of her husband, Ervin Lee Holley, for personal injuries to her husband, and for exemplary damages. In her complaint, plaintiff alleged, in summary, the following events and circumstances. Defendant Burroughs Wellcome Co. manufactures and sells Anectine<sup>TM</sup>, a depolarizing neuromuscular blocking agent, intended for and used as a muscle relaxant to facilitate endotracheal intubation of patients under general anesthesia. Defendant Ayerst Laboratories manufactures and sells Fluothane<sup>TM</sup>, an inhalation anesthetic agent used to induce a state of general anesthesia in humans. While plaintiff's husband, Ervin Holley, was undergoing knee surgery at Duke University Medical Center on 5 April 1976, he was administered both Anectine<sup>TM</sup> and Fluothane<sup>TM</sup>. During the operation, Holley suffered cardiac arrest and resultant severe and permanent brain damage. Holley's injuries were caused by the negligent failure of defendants to warn health care providers of the known dangerous characteristics and tendencies of their respective products when used alone or in conjunction with each other. Plaintiff's complaint is lengthy, detailed, and characterized by use of technical words and phrases from the fields of medicine and pharmacology. It was signed by counsel as follows:

McCain & Moore

By: Grover C. McCain, Jr.  
William H. Moore, Jr.  
Counsel for Plaintiff

James M. Ludlow  
Counsel for Plaintiff

Plaintiff served interrogatories and requests for admissions contemporaneously with her complaint. These documents bear the same counsel's signatures as did the complaint. On 1 April 1981, defendant Burroughs Wellcome Co. filed a motion to bar Moore

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from further appearing in the cause, alleging that Moore was not licensed to practice law in North Carolina, that he had not petitioned the Court for admission to practice under Chapter 84 of the General Statutes, and that he was engaged in the practice of law in North Carolina in plaintiff's action. Plaintiff's response to Burroughs Wellcome Co.'s motion, signed by attorneys McCain and Ludlow, alleged plaintiff's desire for Moore to assist her North Carolina counsel in her action, prayed that the trial court deny Burroughs Wellcome Co.'s motion, and requested that the trial court entertain Moore's motion to be permitted to appear *pro hac vice* in association with her North Carolina counsel. In support of her response, plaintiff filed affidavits of James M. Ludlow, Gary S. Smithwick, Clark Fischer, Leslie G. Frye, Michael J. Lewis, Thomas J. Keith, Harrell Powell, Jr., and George Rountree, III, all licensed and practicing lawyers in North Carolina. All attested to Moore's standing as a member of the Georgia bar, his expertise as a practicing lawyer, and his good character.

Defendant Burroughs Wellcome Co.'s motion came on for hearing before Judge Bailey on 13 April 1981. At that time, Moore moved the trial court to be admitted *pro hac vice* in plaintiff's action. Moore's motion was supported by his own affidavit and by a statement to the Court by Ludlow, all of which are set out in full as follows:

**MOTION OF WILLIAM H. MOORE, JR., OF THE GEORGIA BAR  
TO BE ADMITTED *PRO HAC VICE* TO APPEAR IN ASSOCIATION  
WITH RETAINED NORTH CAROLINA COUNSEL**

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Come now the movant, William H. Moore, Jr., a member of the State Bar of Georgia, and respectfully moves this Honorable Court to be admitted *pro hac vice* to appear, in association with retained counsel, for the plaintiff in the captioned cause. Movant shows that he has been retained by James M. Ludlow, retained counsel for the plaintiff to associate and assist Mr. Ludlow in the handling of the captioned cause.

Movant attaches to his motion that affidavit required by NCGS 84-4. (Illegible)

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WHEREFORE, movant respectfully moves that he be admitted *pro hac vice* to assist retained counsel in the captioned cause.

s/WILLIAM H. MOORE, JR.  
Movant

AFFIDAVIT OF WILLIAM H. MOORE, JR.

Personally appeared before the undersigned notary public, William H. Moore, Jr., who upon being put upon his oath deposeth and sayeth:

My name is William H. Moore, Jr. I am a resident of Savannah, Georgia, residing at 910 Victory Drive, Savannah, Georgia, and I am a member in good standing of the State Bar of Georgia duly licensed and admitted to practice law by the State of Georgia.

If I am permitted to appear *pro hac vice* in the captioned cause, unless permitted to withdraw sooner by this Honorable Court, I will continue to represent the plaintiff in that cause until its final determination with reference to all matters incident to that cause. I will be subject to the orders of, and amenable to, the disciplinary actions and civil jurisdictions of the General Court of Justice in all respects as if I were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

The State of Georgia grants the privilege of *pro hac vice* admissions to members of the Bar of North Carolina in good standing.

I have been associated by, and will be personally appearing with, two attorneys who are residents of the State of North Carolina who are duly and legally admitted to practice in the General Court of Justice of North Carolina upon whom service may be had in all matters connected with the captioned cause with the same effect as if personally made on me within the State.

Attached to this affidavit is the statement of James M. Ludlow, retained counsel in the captioned cause, associating



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me to assist him in the handling of this cause and setting forth his client's consent to the association.

s/WILLIAM H. MOORE, JR.

(Sworn to this 14th day of April, 1981.)

STATEMENT OF JAMES M. LUDLOW

My name is James M. Ludlow. I am an attorney at law, duly licensed and admitted to practice in the General Court of Justice of the State of North Carolina. I maintain my law office at 2514 University Drive, Durham, North Carolina.

I have been retained by the plaintiff in the captioned case to represent her and her husband, adjudicated an incompetent, in the captioned cause, and at the request and with the expressed consent of the plaintiff I have retained William H. Moore, Jr. of the Savannah, Georgia Bar to associate with and assist me in the handling of the captioned cause as my associate counsel.

Mr. Moore is to be compensated for his services by a portion of my contingent fee at no additional expense to my client.

I join in Mr. Moore's motion that he be admitted *pro hac vice* to appear with and assist me in representing the plaintiff.

s/JAMES M. LUDLOW  
Counsel for Plaintiff

The dispositive portions of Judge Bailey's order are as follows:

8. William H. Moore, Jr., in signing the complaint, interrogatories, request for admissions and brief and filing the same in this action engaged in the practice of law in this State and made a general appearance on behalf of the plaintiff showing his address as McCain & Moore, 702 West Cobb Street, Durham, North Carolina.

9. On the date this matter was calendared for hearing, April 13, 1981, William H. Moore, Jr., filed a motion herein

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entitled Motion of William H. Moore, Jr. of the Georgia Bar to be Admitted Pro Hac Vice to Appear in Association With Retained North Carolina Counsel. Said motion contains an affidavit as required by N.C.G.S. 84-4.1 for limited admission of out-of-state attorneys. However, the said affidavit does not indicate that William H. Moore, Jr. is a "practicing attorney" in Georgia (N.C.G.S. 84-4.1(1)); but indicates he is licensed and admitted to practice in Georgia; the motion does not contain a statement signed by his client as required by N.C.G.S. 84-4.1(2) but contains a "Response" by Grover C. McCain, Jr. and James Ludlow, counsel for plaintiff in support of said motion and other affidavits.

. . .

11. William H. Moore, Jr. is not licensed to practice law in the State of North Carolina and he has engaged in unauthorized practice of law herein.

12. William H. Moore, Jr. failed to file a motion herein to be admitted to practice pursuant to N.C.G.S. 84-4.1 until more than three months following the filing of this action and other documents signed by him, and did so only after motion had been filed challenging his appearance in this matter.

13. The motion filed by William H. Moore, Jr. fails to meet the requirements of G.S. 84-4.1 as indicated in paragraph 9 of this Order.

WHEREFORE, IT IS HEREBY ORDERED, in the discretion of the undersigned, that the application of William H. Moore, Jr. to be admitted to practice in the General Court of Justice for the sole purpose of appearing on behalf of the plaintiff, is DENIED. William H. Moore, Jr. shall not, in any manner, further engage in the practice of law in this action.

Plaintiff has appealed from Judge Bailey's order.

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*Sanford, Adams, McCullough & Beard, by Robert W. Spearman, for plaintiff-appellant.*

*Teague, Campbell, Conely & Dennis, by Richard B. Conely, for defendant-appellee.*

*Narron, O'Hale and Woodruff, P.A., by Gordon C. Woodruff, on Behalf of the North Carolina Academy of Trial Lawyers, Amicus Curiae.*

WELLS, Judge.

The statutory provisions under which lawyers not licensed in North Carolina may be admitted to practice *pro hac vice* in North Carolina are found in G.S. 84-4.1, as follows:

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney regularly admitted to practice in the courts of record of another state and in good standing therein, having been retained as attorney for any party to a legal proceeding, civil or criminal, pending in the General Court of Justice of North Carolina, or the North Carolina Utilities Commission or the North Carolina Industrial Commission may, on motion, be admitted to practice in the General Court of Justice or North Carolina Utilities Commission or the North Carolina Industrial Commission for the sole purpose of appearing for his client in said litigation, but only upon compliance with the following conditions precedent:

- (1) He shall set forth in his motion his full name, post-office address and status as a practicing attorney in such other state.
- (2) He shall attach to his motion a statement, signed by his client, in which the client sets forth his post-office address and declares that he has retained the attorney to represent him in such proceeding.
- (3) He shall attach to his motion a statement that unless permitted to withdraw sooner by order of the court, he will continue to represent his client in such proceeding until the final determination thereof, and that with reference to all matters incident to such proceeding, he agrees that he shall be subject to the orders and amenable to the

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disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if he were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

- (4) He shall attach to his motion a statement to the effect that the state in which he is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.
- (5) He shall attach to his motion a statement to the effect that he has associated and has personally appearing with him in such proceeding an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with such legal proceedings, or any disciplinary matter, with the same effect as if personally made on such foreign attorney within this State.
- (6) Compliance with the foregoing requirements shall not deprive the court of the discretionary power to allow or reject the application.

**[1]** Judge Bailey found Moore's affidavit to be non-conforming in two respects. We agree that Moore's affidavit is not accompanied by the statement from his client, plaintiff in this action, as required under Subsection (2) of the statute. Such a statement is clearly required, and this requirement cannot be met by substituting the statement of North Carolina counsel. The statement must be signed by the client.

**[2]** We do not agree that Moore's affidavit failed to meet the requirements of subsection (1) of the statute. We hold that a declaration by an applicant that he is a member in good standing of the Bar of another state and is duly licensed and admitted to practice in that state is sufficient to meet the requirements of subsection (1).

**[3]** Judge Bailey's order is tainted by a more fundamental error. He found that Moore's affidavit did not meet the requirements of the statute, yet he denied Moore's application in the exercise of his discretion. In *In Re Smith*, 301 N.C. 621 at 631, 632, 272 S.E. 2d 834 at 841 (1980), our Supreme Court made it abundantly clear

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that unless and until a G.S. 84-4.1 application meets the requirements of the statute, the court's discretionary power is not invoked:

The discretionary power of the court expressed in G.S. 84-4.1(6) arises "only upon compliance with the . . . conditions precedent" contained in G.S. 84-4.1(1-5). Those conditions must first be met. Then and only then does the Court have "discretionary power to allow or reject the application."

. . .

Unless and until subsections (1) through (5) are complied with, the court has no discretion whatever.

Plaintiff has a fundamental right to select counsel who will represent her; *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490 (1968), and plaintiff should be allowed every reasonable opportunity to exercise that right.

Had Judge Bailey ruled as a matter of law that Moore's application failed to meet the requirements of the statute, plaintiff could have requested leave to amend and correct the deficiencies found by Judge Bailey. Judge Bailey having erroneously exercised his discretion in the matter, we are persuaded that the interests of justice require that his order be vacated and matter remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judges HILL and BECTON concur.

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MARGARET RUTLEDGE, EMPLOYEE, PLAINTIFF v. TULTEX CORP./KINGS  
YARN, EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CAR-  
RIER, DEFENDANTS

No. 8110IC547

(Filed 16 March 1982)

**1. Master and Servant § 68— no occupational disease—finding supported by evidence**

In a workers' compensation proceeding, findings of the Commission which stated that exposure to cotton dust at defendant's plant did not cause or

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significantly contribute to plaintiff's pulmonary disease were supported by medical evidence.

**2. Master and Servant § 68— last employment contributing to rather than cause of occupational disease**

The Commission erred in requiring a plaintiff to prove that her last employment was the cause of her occupational disease since G.S. 97-57 assesses liability to the employer in whose employment the employee was last injuriously exposed, however minimal the exposure, to the hazards of the occupational disease.

**3. Master and Servant § 68— workers' compensation—evidence failed to establish occupational disease**

In light of *Walston v. Burlington Industries*, 304 NC 670 (1982), in which the evidence was similar to the evidence in this workers' compensation proceeding, the medical evidence presented did not establish that plaintiff had an occupational disease even though the evidence would have supported either a finding of no causation or a finding of aggravation or acceleration of a pre-existing condition.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission entered 19 January 1981. Heard in the Court of Appeals 28 January 1982.

This action involves a claim by plaintiff for disability benefits under the Workers' Compensation Act for work-related respiratory disease. Defendant Tultex Corporation (Kings Yarn) and its insurance carrier denied the claim. Upon the filing of the claim, plaintiff was referred by the Commission to Dr. Charles D. Williams, Jr., in Charlotte. Dr. Williams is a specialist in pulmonary disease and a member of the Industrial Commission's Textile Occupational Disease Panel.

At a hearing before Deputy Commissioner Denson in Rockingham, plaintiff testified that she was born on 8 August 1935. After finishing the tenth grade, plaintiff began working in textile mills. She worked in four different mills between 1953 and 1979, her last employment being twenty-three months as a winder for defendant-employer. Plaintiff testified that she was continually exposed to cotton dust in the air at her various jobs. Plaintiff testified that she had never had any kind of breathing problem before she began working in textile mills. Her breathing and coughing difficulties began about 1971. As her symptoms worsened, she sought medical treatment frequently. She had recurring attacks of pneumonia and bronchitis. Plaintiff testified that she

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started smoking cigarettes at age 15 and smoked a pack of cigarettes a day until she quit in February of 1979. On her doctor's advice, she quit working at defendant's mill in January 1979 due to her breathing problems.

Defendant-employer introduced evidence that its Rockingham plant was recently constructed and that operation of the plant began in 1973. The plant was relatively clear of cotton dust and lint; most of the material produced was synthetic, with only thirty percent cotton used in the total production.

In the medical report prepared by Dr. Williams, he diagnosed plaintiff's problems as follows:

"The patient has definite chronic obstructive pulmonary disease representing a combination of pulmonary emphysema and chronic bronchitis. It is most likely that cigarette smoking and recurrent infection has [sic] played prominent roles in her pulmonary impairment. It is not possible to completely exclude cotton dust as playing some role in causing an irritative bronchitis but she does not give a classical history of byssinosis."

In his deposition Dr. Williams further stated that it was his opinion that plaintiff's exposure to cotton dust for over twenty-five years was "probably" a cause of her chronic obstructive lung disease, and that the impairment of her ability to perform labor was related to her pulmonary disease. He also stated that plaintiff's history of cigarette smoking was a cause of her illness, "after taking into consideration her exposure to cotton dust." It was his opinion that exposure to the working conditions at defendant-employer's plant would have had a minimal effect on plaintiff's condition, but that "exposure to any type of dust in someone with pre-existing chronic bronchitis could have some aggravating effect on the underlying condition." He believed that plaintiff's condition was caused by circumstances which existed prior to her employment with defendant. He stated that it is his opinion that textile workers are at a greater risk of contracting chronic obstructive lung disease than is the general public.

At the conclusion of the evidence, Deputy Commissioner Denson denied plaintiff's claim after making pertinent findings of fact and conclusions of law as follows:

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"4. Although the various plants that plaintiff has worked in have had a lot of cotton dust and lint, defendant employer's premises, both in weaving and spinning, are relatively clean. The mill processed 50 percent cotton and occasionally blends of even lesser cotton. Although there was respirable cotton dust in the weave room, there was much less than there were in other premises.

5. In about 1969 or 1970, plaintiff noticed that she began developing a cough at work. In about 1971, she also began developing a shortness of breath and noticed that her cough was associated with her presence at work. Her shortness of breath became severe in December of 1976 and she has had various bouts with it since that time having to be out of work.

6. Plaintiff suffers from chronic obstructive pulmonary [*sic*] disease having both an element of pulmonary [*sic*] emphysema and chronic bronchitis. Cigarette smoking and recurrent infection have played prominent roles in the pulmonary [*sic*] impairment. Cotton dust may aggravate it, but since plaintiff was showing her symptomatology in problems prior to her employment with defendant employer, exposure at defendant employer has neither caused nor significantly [*sic*] contributed to plaintiff's chronic obstructive pulmonary [*sic*] disease.

7. Plaintiff is disabled, because of her pulmonary [*sic*] impairment from all but sedentary type of work which must be in a clean environment because of her reaction to cotton dust and other such irritance. [*sic*]

8. Plaintiff has not contracted chronic obstructive lung disease as a result of any exposure while working with defendant employer.

\* \* \* \* \*

The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSION OF LAW

1. Plaintiff has not contracted an occupational disease as a result of her exposure to cotton dust in her employment



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with defendant employer and defendants do not owe plaintiff compensation therefor."

Plaintiff appealed to the Full Commission which on 19 January 1981 adopted as its own the Opinion and Award entered by Denson. One Commissioner dissented. Plaintiff thereupon appealed to this Court.

*Hassell & Hudson by Robin E. Hudson for plaintiff appellant.*

*Mason, Williamson, Etheridge and Moser by James W. Mason and Terry R. Garner for defendant appellees.*

CLARK, Judge.

Under the provisions of G.S. 97-86, the Industrial Commission is the fact-finding body and as such its findings of fact are conclusive on appeal if supported by competent evidence. Therefore, the scope of our review is limited to two questions of law: "(1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision." *Inscoe v. Industries, Inc.*, 292 N.C. 210, 216, 232 S.E. 2d 449, 452 (1977).

[1] In the present case, plaintiff excepts to Findings of Fact Nos. 6 and 8, which state that exposure to cotton dust at defendant-employer's plant did not cause or significantly contribute to plaintiff's pulmonary disease. The medical evidence presented tends to show that plaintiff suffers from pulmonary emphysema and chronic bronchitis, most likely caused by cigarette smoking and recurrent infection. Dr. Williams stated that plaintiff's exposure to cotton dust was "probably" a cause of her pulmonary disease, adding that she did not have a classical history of byssinosis. It was Dr. Williams' opinion that plaintiff's condition was caused by circumstances which existed prior to her employment by defendant-employer and that the effect of working conditions at the plant upon her health was minimal. Dr. Williams also stated that while removal of plaintiff from the mill environment might improve her coughing, it would not have any significant effect on the underlying chronic obstructive pulmonary disease. We therefore find sufficient medical evidence to support Findings of Fact Nos. 6 and 8.

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[2] We agree, however, with plaintiff that the Commission erred in requiring plaintiff to prove that her last employment was the cause of her occupational disease. G.S. 97-57 assesses liability to the employer in whose employment the employee was last injuriously exposed, however minimal the exposure, to the hazards of the occupational disease. The evidence presented showed some aggravation of plaintiff's respiratory problems by her exposure to the working conditions at defendant-employer's mill. We find this error harmless as a matter of law, however, since we agree with the Commission's conclusion that plaintiff has not contracted an occupational disease and is therefore not entitled to Workers' Compensation benefits.

[3] In order to be compensable under the Workers' Compensation Act an injury or death must result from an accident arising out of and in the course of employment or an occupational disease. *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). The issue presented here, of course, is whether plaintiff has an occupational disease. The three elements necessary to prove the existence of a compensable occupational disease are: "(1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of causation, i.e., proof of a causal connection between the disease and the employment." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E. 2d 101, 106 (1981); *Booker v. Medical Center*, *supra*.

We find the recent decision handed down by our Supreme Court in *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982), dispositive of the issues presented in the case *sub judice*. In *Walston* the plaintiff suffered from chronic bronchitis and pulmonary emphysema. The medical evidence indicated that plaintiff's exposure to cotton dust for thirty years in his employment could "possibly" have played a contributory role in the causation of his respiratory problems. The expert physician (again, Dr. Williams) stated that plaintiff's cigarette smoking would "most likely play a part in his pulmonary disability." Walston, like the plaintiff in the case *sub judice*, did not have a classical history of byssinosis.

The Supreme Court concluded:

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"It thus appears that substantially all of the competent medical evidence tends to show that plaintiff suffers from several ordinary diseases of life to which the general public is equally exposed, none of which have been proven to be due to causes and conditions which are characteristic of and peculiar to any particular trade, occupation or employment and none of which have been aggravated or accelerated by an occupational disease. This is fatal to plaintiff's claim. G.S. 97-53(13); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951)."

*Walston v. Burlington Industries, supra*, at 679, 285 S.E. 2d at 827.

In light of *Walston*, we do not believe that the medical evidence in the case here presented establishes that plaintiff has an occupational disease. It should be noted that we have also considered the decisions in *Hansel v. Sherman Textiles, supra*; *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981); and *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979), including the dissenting opinion by Justice Exum in *Morrison* and his concurring opinion in *Hansel*. The differences of opinion support the conclusion that the problem is a difficult one.

We find the medical evidence in *Walston* and the case *sub judice* somewhat nebulous and confusing, and we believe that it would support either a finding of no causation or a finding of aggravation or acceleration of a pre-existing condition, which would justify a remand for further findings as in *Hansel*. But we find the evidence in *Walston* remarkably similar to the evidence in the case before us, and, therefore, we hold that this case is controlled by *Walston*.

For the reasons stated above, the Order and Award of the Industrial Commission is

Affirmed.

Judges ARNOLD and WHICHARD concur.

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**STATE OF NORTH CAROLINA v. KEITH EUGENE COLLINS**

No. 8121SC657

(Filed 16 March 1982)

**1. Searches and Seizures § 23— search warrant—sufficiency of officer's affidavit**

An officer's affidavit to obtain a search warrant contained sufficient information for the issuing official to determine that there were reasonable grounds to believe that illegal drugs were present in the house to be searched where the officer alleged that he observed another person go into the house with instructions to buy LSD and come out three or four minutes later with several "hits" of "star acid" which he gave to the officer.

**2. Searches and Seizures § 24— observation of informant's acts—showing of reliability unnecessary—admission against penal interest**

Where undercover officers observed an informant go to defendant's house with instructions to purchase LSD and come out three or four minutes later with LSD which he gave to the officers, one officer's affidavit to obtain a warrant to search defendant's house was not based on hearsay, and it was not necessary for the affidavit to set forth facts showing the credibility of the informant or the reliability of the information, notwithstanding the officers failed to search the informant before he entered defendant's house. Furthermore, the informant's statement to the officers that he could procure LSD for them and his acquisition of LSD amounted to an admission against penal interest which showed that his information was reliable even though the informant did not know that the officers were policemen at the time he obtained the LSD.

**3. Narcotics § 4.3— constructive possession of marijuana—sufficiency of evidence**

The State's evidence was sufficient for the jury to find that marijuana was found in a house under the control of defendant and that he thus had constructive possession of the marijuana where it tended to show that defendant rented the house; defendant was seen at the house every day; defendant was seen moving furniture out of the house subsequent to a search which discovered marijuana; defendant was responsible for the cost of water service to the house; and defendant received mail addressed to him at the house.

APPEAL by defendant from *Seay, Judge*. Judgment entered 6 March 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 December 1981.

Defendant was arrested on 18 October 1980 in Winston-Salem pursuant to a search of the house he rented. The search was conducted upon the issuance of a warrant, and property was seized by the officers. Defendant was charged with felonious possession of marijuana and possession of a hypodermic needle and syringe. He moved to suppress the evidence on the grounds that the facts

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set forth in the application for the warrant failed to establish probable cause for the search.

Evidence adduced at the hearing on the motion to suppress tended to show that on 18 October Detectives J. D. Pittman and V. J. Hutcherson of the Winston-Salem Police Department met a person known to them as Mike Smith. Smith said he could get them some LSD for \$3 a "hit." Smith, unaware that the men were police officers, accompanied them in their car to the intersection of Patria and Limina Streets, where he was given money and told to purchase some LSD. The officers, parked approximately 75 feet away, watched Smith walk into a house at 2722 Patria Street and close the door. He emerged from the house in approximately three or four minutes, returned to the officer's vehicle and gave Officer Pittman six "hits" of "star acid" and some change. He told Officer Pittman that he had made the purchase from someone known as "K.C." and indicated that the person who sold the LSD had some more. A warrant was issued to search the house on Patria Street for LSD. No LSD was found in the house, but bags of marijuana and a needle and syringe were discovered.

The motion to suppress was denied. Defendant was found not guilty of possession of a hypodermic needle and syringe, but he was convicted of felonious possession of marijuana in violation of G.S. 90-95(a)(3). He appeals from a judgment of imprisonment.

*Attorney General Edmisten, by Associate Attorney Reginald L. Watkins, for the state.*

*Badgett, Calaway, Phillips, Davis, Stephens, Peed and Brown, by B. Ervin Brown, II, for defendant appellant.*

MORRIS, Chief Judge.

Defendant contends that his motion to suppress should have been granted. He asserts that the trial court's denial of the motion deprived him of his Fourth and Fourteenth Amendment right to be free from unreasonable search and seizure. Specifically, defendant argues that the application for the search warrant did not satisfy the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), because the issuing official was not sufficiently informed of the underlying circumstances from which the informant, Smith, concluded that there was con-

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traband on the premises, and because there was no showing that Smith was a credible informer or his information reliable.

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U.S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello v. United States*, supra, [357 U.S.] at 486; *Johnson v. United States*, supra, [333 U.S.] at 14, or, as in this case, by an unidentified informant." 378 U.S. at 114-15, 12 L.Ed. 2d at 729, 84 S.Ct. at 1514.

Quoted in *State v. Hayes*, 291 N.C. 293, 298, 230 S.E. 2d 146, 149 (1976).

In the case *sub judice*, the issuing official had before him the affidavit of Detective Hutcherson, which we quote in part:

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: I am Detective V. J. Hutcherson of the Winston-Salem Police Dept. and as such, am empowered to search for and seize contraband as described in North Carolina General Statutes, Chapter #90. On Saturday, 10-18-80, at approximately 1630 hours, I was contacted by a white male known to me as "Mike". Mike stated that he could obtain some acid for me for \$3.00 a hit. I advised Mike that I would like to purchase some acid. Mike got in my vehicle and directed me to 2722 Patria Street. I parked my vehicle at the intersection of Patria Street and Lemly Street. I gave Mike \$20.00 and asked him to purchase me five hits. Mike left the vehicle and walked south to the above described location on Patria Street. I personally observed Mike enter the dwelling on Patria Street. In approximately four minutes, Mike exited from the same loca-

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tion and walked directly back to my vehicle. Mike handed over \$2.00 change and (6) hits of star acid. Mike stated that the person who sold him the acid had some more if I wanted to buy some more. Mike was then transported to a location and released.

An affidavit is generally deemed sufficient "if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971).

[1] We hold that Detective Hutcherson's affidavit contains facts sufficient for the issuing official to determine that there were reasonable grounds to believe that illicit drugs were present in the house on Patria Street. The personal observation of the officers was enough to sustain the finding of probable cause necessary for the issuance of a warrant. Detective Hutcherson averred that he observed Smith go into the house with instructions to buy LSD, and come out three or four minutes later with several "hits" of "star acid" which he gave to Hutcherson. This Court, in *State v. McLeod*, 36 N.C. App. 469, 244 S.E. 2d 716, *cert. denied*, 295 N.C. 555, 248 S.E. 2d 733 (1978), found in reference to an officer's affidavit containing an observation nearly identical to the one made by Hutcherson, that "[n]o more information was required in order to establish the probable cause necessary to support the search warrant issued. . . ." *Id.* at 472, 244 S.E. 2d at 719. Therefore, with cognizance of the *Aguilar* test, "[w]e find the personal observations of the police officer as set forth in the affidavit in the case sub judice [sufficient] to meet the first 'prong' of the test." *Id.*

[2] Defendant also asserts, however, that the second or "veracity prong" of the test was not satisfied in the case before us, because the affidavit contains no facts from which the issuing official could imply that the informant was credible or his information reliable. We disagree on two grounds. First, the affidavit does not rest on hearsay. "Even though the affidavit contained some information which may have come from an . . . informant, . . . the credibility of the informant or the reliability of such information need only

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be shown when it is necessary that such hearsay be relied upon in finding the requisite probable cause." *Id.*; see *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969). As indicated above, the facts here, as in *McLeod*, do not set forth circumstances requiring such reliance, and the second prong of *Aguilar* does not come into play.

Even were the second prong of the *Aguilar* test applicable here, Smith's statement that he could procure LSD for the officers and his acquisition of the drug amounted to an admission against penal interest, *United States v. Harris*, 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075 (1971); *State v. Harris*, 43 N.C. App. 184, 258 S.E. 2d 415 (1979); *State v. Tickle*, 37 N.C. App. 416, 246 S.E. 2d 34 (1978); *State v. Beddard*, 35 N.C. App. 212, 241 S.E. 2d 83 (1978), showing his information to be reliable. Defendant maintains that Smith's actions in obtaining the LSD did not serve as a declaration against penal interest because he did not know that Hutcherson and Pittman were police officers. Yet "[i]t should not be assumed . . . that an admission against penal interest can be used to establish reliability only when that admission is made directly to a law enforcement officer, for that is not the case." W. LaFave, 1 Search and Seizure § 3.3 at 530 (1978). We conclude that there is as much or more reason to rely on Smith's unmindful admission than on a statement made knowingly to police. The Supreme Court of Minnesota, citing LaFave, held, in a case similar on its facts, that an informant who offered to sell stolen property to a police officer, whom the informant did not know was a law enforcement official, had committed a crime; and, therefore, the informant's statements were against his penal interest. *State v. Wiberg*, --- Minn. ---, 296 N.W. 2d 388 (1980). Smith was not a paid police informer, nor was he promised any sort of inducement to speak. He had no motive to lie and his words were spoken in circumstances consistent with their reliability. It does not matter that the informer spoke directly to undercover police officers whose real identities were unknown to him.

Defendant argues that the informer's reliability was compromised by the failure of the police to search him before he entered the house on Patria Street, as he may have had the LSD on his person prior to entering the house rather than having bought it there. The argument is unconvincing, however. The in-



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vestigation of the case was conducted surreptitiously. Smith's lack of knowledge as to the officers' identity, which enhanced his credibility, obviously rendered it impossible for Hutcherson or Pittman to search him before he entered the house to make the drug purchase without revealing themselves as officers. We held in *State v. McLeod*, supra, that even in situations in which officers conduct "controlled buys" of narcotics, failure to search the individual making the purchase prior to its actually being made and specifically setting forth the fact in the affidavit by which a search warrant is sought is not fatal.

[3] Defendant contends that the evidence presented at trial was not sufficient to sustain his conviction in that it did not establish actual or constructive possession of the marijuana. On the contrary, we find plenary evidence of possession.

According to a next door neighbor, defendant was a renter whom she saw every day. There was evidence that defendant had paid rent, and he was seen moving furniture out of the house subsequent to the 18 October search. Further, evidence tending to show constructive possession of marijuana included a document showing defendant's assumption of liability for water service for the house with the billing and service address being 2722 Patria Street, a request dated 4 November to discontinue water service indicating that defendant would no longer be liable, a water bill for the period 19 August to 4 November 1980 indicating defendant was the party billed, and an envelope from a law firm addressed to defendant at 2722 Patria Street. We think this evidence sufficient to show defendant had the power and intent to control the disposition or use of the confiscated marijuana so as to have it in his constructive possession. See *State v. Cockman and Lucas*, 20 N.C. App. 409, 201 S.E. 2d 740, cert. denied 285 N.C. 87, 203 S.E. 2d 61 (1974). The fact that the marijuana was found on premises under the control of defendant, "in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972).

In defendant's trial and the judgment of the court, we find

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No error.

Judges HEDRICK and MARTIN (Robert M.) concur.

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STATE OF NORTH CAROLINA v. LARRY DARNELL ERBY

No. 8127SC1012

(Filed 16 March 1982)

**1. Criminal Law §§ 33, 87.4; Homicide § 19— self-defense—relevancy of carrying loaded gun—questions on redirect improperly excluded**

In a prosecution concerning a homicide where the defendant alleged self-defense, the trial court erred in failing to allow defendant, on redirect examination, to explain the circumstances that led him to carry a gun on the night he shot decedent since (1) the prosecution had cross-examined him extensively concerning the fact he carried a loaded gun, and (2) the excluded evidence would have shed light on defendant's self-defense claim.

**2. Criminal Law § 89.6— impeachment—intimate relationship of witness to decedent**

The trial court erred in a prosecution concerning a homicide when it failed to allow defense counsel to ask a witness if she was in love with decedent as the existence of bias may be shown by the intimate relationship of the witness to the decedent.

**3. Criminal Law § 89.4— inconsistent statement of witness—failure to give limiting instruction**

The court's failure to give a requested limiting instruction concerning a prior inconsistent statement a witness made to police constituted reversible error.

**4. Criminal Law § 86.6— prior consistent statement of defendant—exclusion reversible error**

The trial court erred in sustaining objections to testimony of a defense witness who had heard defendant talk to his mother-in-law over the telephone at the police station. The statements were consistent with defendant's trial testimony that he acted in self-defense, and they should have been admitted as corroborating his testimony.

**5. Criminal Law § 102— denial of opportunity to give two hour closing argument—only one address to jury**

Defendant failed to show a violation of G.S. 84-14 where he argued that the trial judge denied his motion to recess for the day at 4:20 p.m. and begin closing arguments in the morning, as well as his motion for a ten-minute recess to prepare his argument, where the record contained no notation of what time defendant did, in fact, conclude his argument.

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State v. Erby

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APPEAL by defendant from *Davis, Judge*. Judgment entered 19 February 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 2 March 1982.

Defendant appeals from his conviction of voluntary manslaughter and from a sentence of imprisonment for a maximum term of twenty years and a minimum term of eighteen years.

This case involves the shooting death of James Ernest Walls on 27 September 1980. The incident occurred at the Uganda Club in Gaston County and was the result of an argument between the defendant and the deceased. The defendant claimed self-defense.

Numerous witnesses testified at trial, including the defendant and the deceased's girlfriend, Doretha Coles, whose differing versions of the events leading up to the shooting represent the essential conflict in the testimony. Both versions are corroborated by testimony of other witnesses.

Miss Coles testified that the defendant threatened to kill the deceased and the deceased replied, "Kill me." Almost immediately the defendant shot the deceased. The deceased never threatened the defendant, never went into his pocket, and never approached the defendant before he was shot.

Defendant testified that the deceased began walking toward him with his right hand in his pocket, threatening to kill him. The defendant took several steps back, then reached into his pocket for the gun and shot the deceased.

After the shooting, the police found a knife in the deceased's right front pants pocket. The blade was locked in an open position.

*Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.*

*Assistant Appellate Defender James H. Gold for defendant.*

MARTIN (Harry C.), Judge.

[1] Defendant is entitled to a new trial. Of numerous assignments of error raised on appeal, all of which have merit, we will limit our discussion to those evidencing obvious error and prejudice to the defendant.

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On direct examination of the defendant, he was asked the following question in an effort to offer an explanation as to why he was carrying a gun on the night of the shooting:

Q. All right, and how did it [the gun] come to be in your right front pocket?

A. The night before, we had some trouble down there. Some guys was shooting—

DISTRICT ATTORNEY: Objection.

COURT: Sustained. Members of the jury, you will not consider the last statement made by the defendant about anything that may have happened the night before.

On cross-examination defendant was asked why he was carrying a gun on that night and he stated, "Because we had some trouble down there where I live." The testimony was allowed. The district attorney, however, chose not to pursue this line of questioning.

Defendant, on redirect examination, again attempted to explain the circumstances that led him to carry the gun:

Q. The district attorney also asked you why you came to have the gun in your pocket on that Friday night, September 27th.

A. Yes.

Q. All right, and you told him because there had been some trouble in front of your house?

A. Yeah.

Q. Well, explain that to the jury.

DISTRICT ATTORNEY: Objection.

COURT: Sustained.

On the state's cross-examination, the prosecutor questioned the defendant extensively concerning the fact that he entered the Uganda Club carrying a loaded gun. The implication was that the defendant was "looking for trouble." (In the words of Judge Davis during a voir dire examination: "A man leaves his house armed

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with a gun goes out looking for trouble. . . . He just cold-bloodedly killed a man . . . .")

Contrary to the state's contention that the testimony would be irrelevant, we find the excluded evidence would have shed light on defendant's self-defense claim. The state opened the door to this line of questioning on cross-examination and argued that the self-defense claim was not credible because defendant was carrying a loaded gun. Defendant was entitled to rebut this argument and to fully present his defenses within reasonable limits. See *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979).

[2] On cross-examination of the state's witness Doretha Coles, Judge Davis sustained the prosecutor's objection when defense counsel asked Miss Coles if she was in love with the decedent. Miss Coles's testimony was damaging to defendant's defense of self-defense and in direct conflict with defendant's version of the events. The purpose of the question was to impeach the witness for bias, a circumstance to be considered in determining the weight given to her testimony. The existence of bias may be shown by the intimate relationship of the witness to the decedent. 1 Stansbury's N.C. Evidence § 45 (Brandis rev. 1973); *State v. Spaulding*, 216 N.C. 538, 5 S.E. 2d 715 (1939). The exclusion of this testimony was error and defendant was prejudiced thereby.

[3] On cross-examination of defense witness Wallace, the prosecutor sought to impeach his testimony by questioning him concerning a prior inconsistent statement he made to police on the night of the shooting. Defense attorney objected and requested a limiting instruction. The objection was overruled and the request denied. The court also failed to so instruct during its charge to the jury.

In North Carolina it is established law that prior inconsistent statements are not admissible as substantive evidence, but may be introduced for the jury's consideration in determining the witness's credibility. 1 Stansbury, *supra*, § 46. Defendant was entitled, upon request, to have the evidence limited to the purpose for which it was competent. *Id.* § 79; *State v. Norkett*, 269 N.C. 679, 153 S.E. 2d 362 (1967). The court's complete failure to give the requested limiting instruction constitutes reversible error.

[4] Judge Davis sustained the state's objections to the testimony of defense witness Patrolman Bess with respect to defendant's

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prior consistent statements which were offered to corroborate his trial testimony. Patrolman Bess overheard statements made by the defendant while he was talking to his mother-in-law over the telephone at the police station. These statements included: "He start [sic] raising sand and went in his pocket"; "What am I suppose to do—get cut?"; "He didn't have no business going in his pocket on me." The statements were consistent with defendant's trial testimony that he acted in self-defense—he believed that he was going to be attacked with a weapon when he saw the deceased reach into his pocket. Where the testimony offered to corroborate a witness does so substantially, it is not rendered incompetent because there is some variation. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L.Ed. 2d 761 (1972). The court, after conducting voir dire, concluded that the statements did not materially corroborate defendant's testimony. This was error.

The admissibility of prior consistent statements has been reaffirmed by our courts on numerous occasions. See 1 Stansbury, *supra*, § 51. The fact that defendant never testified as to the substance of the telephone call is not a relevant factor. *State v. McLawhorn*, 270 N.C. 622, 155 S.E. 2d 198 (1967). In *Walker v. Baking Co.*, 262 N.C. 534, 138 S.E. 2d 33 (1964), it was held reversible error to exclude the testimony of a highway patrolman as to prior consistent statements of a party witness. Likewise, we so hold.

[5] Finally, defendant assigns as error Judge Davis's denial of his right to present closing arguments to the jury. Defendant contends that he was given less than two hours to argue, in violation of N.C.G.S. 84-14; that he was denied two addresses to the jury, in violation of N.C.G.S. 84-14; that Judge Davis denied his motion to recess for the day at 4:20 p.m. and begin closing arguments in the morning, as well as his motion for a ten-minute recess to prepare his argument.

Both sides rested their cases at approximately 4:15 on the afternoon in question. The record discloses that neither party was prepared to begin closing arguments at this time. The district attorney waived his opening argument, and the record essentially substantiates defendant's contentions. Defendant alleged in his motion to be permitted to make a jury argument the next morn-

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ing that he began his argument at 4:45 p.m. and argued until approximately 5:45 p.m., and that throughout his argument there was evidence that the jury was extremely fatigued. Judge Davis found that "both these allegations [were] false and erroneous." The record contains no notation of what time defendant did, in fact, conclude his argument. The only evidence in the record that defendant argued past 5:00 p.m. was Judge Davis's statement that "[w]e would not have [gone past 5:00] had your argument not lasted past that time." Although it seems highly unlikely, considering the late hour of the day, that defendant argued for a full two hours, we are reluctant to find a violation of N.C.G.S. 84-14 in the absence of recorded proof.

Finally, we hold that it appears from the record that the trial court considered irrelevant and improper matters in the sentencing hearing and in imposing sentence. *See State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967).

Taken separately as well as cumulatively, these errors require a

New trial.

Judges MARTIN (Robert M.) and WHICHARD concur.

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FEDERAL REALTY INVESTMENT TRUST v. BELK-TYLER OF ELIZABETH CITY, INC.

No. 811SC548

(Filed 16 March 1982)

**1. Quasi Contracts and Restitution § 2.1— quantum meruit recovery—insufficient evidence**

In an action to recover unpaid maintenance charges allegedly due under the terms of a lease, the trial court did not err in failing to submit to the jury an issue of *quantum meruit* since (1) there was no evidence from which the jury could have quantified the value of defendant's benefit from plaintiff's services; (2) plaintiff failed to show that defendant "accepted" plaintiff's performance; and (3) there could be no implied contract covering the same subject matter governed by the express agreement of the parties.

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**2. Rules of Civil Procedure § 8; Waiver § 3— instructions on waiver—inconsistency with pleadings**

The trial court's instructions on waiver were inconsistent with the pleadings in violation of G.S. 1A-1, Rule 8(c) where the plea of waiver had been stricken by court order.

**3. Waiver § 3— error in striking plea of waiver**

The court erred in striking the defense of waiver from plaintiff's reply to defendant's counterclaim.

**4. Landlord and Tenant § 6.1— ambiguity in lease—jury question**

The trial court erred in ruling as a matter of law that plaintiff landlord was not required by the terms of a lease to construct a rear access road to its shopping center; rather, the jury should have been permitted to consider evidence of the parties' communications and conduct, as well as the written terms of the contract, in determining whether an ambiguity as to the meaning of contract terms in fact existed.

APPEAL by defendant and cross-appeal by plaintiff from *Bruce, Judge*. Judgment entered 24 February 1981 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 28 January 1982.

This action arises from a lease agreement between the parties, the terms of which have become the subject of dispute.

Evidence for plaintiff (hereafter Federal Realty) was that it had been part-owner of Southgate Mall in Elizabeth City, North Carolina, since 1974 and sole owner since 1978. Belk-Tyler is a tenant of the mall under a 1968 lease agreement with Federal Realty's predecessor. Prior to purchasing the mall, Federal Realty had obtained the signature of Belk's agent on an "estoppel letter" indicating that performance of the parties to the lease agreement was current as of 1974 except in those respects specified by Belk in an attached memorandum.

In March, 1977, Belk ceased making monthly payments of \$837.50 for maintenance services provided by Federal Realty. These payments were not resumed until October, 1978. Federal Realty brought this action to recover unpaid maintenance charges allegedly due.

Belk admitted in its pleadings to non-payment of the maintenance charges, but defended on grounds that Federal Realty had breached its duty to perform according to the terms of agreement, and that Belk's obligation to pay for maintenance had



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been excused by this breach. Specifically, Belk charged plaintiff with failure to provide adequate common area maintenance, failure to construct a rear access road to the mall, failure to provide the number of parking spaces required by the lease, and approval of prohibited use of the mall's common area.

Belk counterclaimed for specific performance under the terms of the contract for construction of a rear access road from Halstead Boulevard, and for additional parking spaces, as well as for other equitable relief not at issue on appeal.

In its reply to the counterclaim, plaintiff raised the defense of waiver, asserting that Belk had relinquished its right to enforce the contract as to the access road and additional parking. The waiver defense was stricken by court order, but plaintiff was later permitted by another judge to amend its reply to plead estoppel.

Federal Realty further alleged that Belk was not entitled to recover because the contract was ambiguous as to the provisions in question and that these ambiguities should be resolved in plaintiff's favor since Belk's attorney had drafted the agreement.

The trial court dismissed Belk's claim for construction of an access road, holding as a matter of law that Belk was entitled only to an easement from Halstead Boulevard to the rear parking lot of the mall.

The jury found that Federal Realty had not substantially performed required maintenance services and was therefore not entitled to recover unpaid maintenance fees. The jury also denied Belk's request for specific performance of Federal Realty's obligation to provide additional parking spaces.

Both plaintiff and defendant appealed.

*C. Glenn Austin for plaintiff appellant/cross-appellee.*

*Leroy, Wells, Shaw, Hornthal & Riley, by Dewey W. Wells, for defendant appellee/cross-appellant.*

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ARNOLD, Judge.

PLAINTIFF'S APPEAL

[1] Federal Realty's sole assignment of error concerns the trial court's failure to submit to the jury the issue of *quantum meruit*. In support of this assertion, plaintiff cites evidence that defendant Belk received the benefits of maintenance services rendered by the landlord during the period in which payments were withheld. It argues that even if its performance was insufficient to fulfill the terms of the express contract, it should be permitted to recover the value of the services under an implied contract.

*Quantum meruit* recovery is based on the amount by which one party is benefited as a result of the other party's performance. *Pilot Freight Carriers, Inc. v. David G. Allen Co.*, 22 N.C. App. 442, 206 S.E. 2d 750, *appeal after remand* 25 N.C. App. 315, 212 S.E. 2d 699, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 625, *cert. denied* 423 U.S. 1055, 96 S.Ct. 786, 46 L.Ed. 2d 644 (1974). We find nothing in the record from which the jury could have quantified the value of defendant's benefit from plaintiff's services here. Moreover, plaintiff failed to show that defendant "accepted" plaintiff's performance as required for quasi contractual recovery. *Hood v. Faulkner*, 47 N.C. App. 611, 267 S.E. 2d 704 (1980). Finally, there can be no implied contract covering the same subject matter governed by an express agreement of the parties. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980). Plaintiff's own evidence shows that such an agreement was in effect between these parties.

In plaintiff's appeal, accordingly, we find no error.

DEFENDANT'S APPEAL

[2] Belk's first assignment of error is that the trial court erred in submitting the issue of "waiver" to the jury as a possible defense to Belk's claim for the number of parking spaces allegedly called for in the parties' agreement. Belk notes that plaintiff's plea of waiver had been stricken by court order and that only the defense of estoppel was set forth in the amended reply.

We have carefully examined the jury instructions and have concluded that the court's instruction on this issue was, at best, a highly confusing one. The court may have intended, as plaintiff

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claims, to instruct on "estoppel." However, the term it used was "waiver," a related, but unquestionably distinguishable defense not raised by the pleadings. We hold, therefore, that the court's instruction was inconsistent with the pleadings in violation of G.S. 1A-1, Rule 8(c).

[3] Ironically, our review of the record has led us to the conclusion that the defense of waiver more nearly conforms to the evidence presented at trial than does the defense of estoppel. We are unable to determine, as a matter of law, whether there exists sufficient evidence of either defense for submission to the jury. However, plaintiff should have been permitted to amend its pleadings to raise either or both defenses and to present such evidence as it may have had available in proof thereof. We hold, therefore, that Judge Brown's order striking the plea of waiver was error.

[4] Belk also assigns as error the court's failure to submit to the jury the issue of Federal Realty's failure to provide a rear driveway to the mall. Federal Realty argues that the court correctly relied on the general rule of contract construction that ambiguous terms should be construed against the party who prepared the contract. While we acknowledge that such a rule exists, and is properly applicable where the intended meaning of a contract term cannot be ascertained with certainty, we find the rule inapplicable here.

The very heart of contract law is that a contract should be construed, wherever possible, so as to give effect to the intent of the parties. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975). In ascertaining the parties' intent, courts may consider the language, subject matter and purpose of the contract, as well as the situation of the parties at the time, and may even read into a contract such implied provisions as may be necessary to effect the parties' intent. *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973). Courts also must give consideration to evidence of the parties' own interpretation of the contract prior to the controversy. *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962); *Shoaf v. Shoaf*, 14 N.C. App. 231, 188 S.E. 2d 19, reversed on other grounds 282 N.C. 287, 192 S.E. 2d 299 (1972).

In the case at bar, it was error for the court to decide the issue relating to construction of a rear entrance as a matter of

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law. The jury should have been permitted to consider evidence of the parties' communications and conduct, as well as the written terms of the contract, in determining whether an ambiguity as to the meaning of contract terms in fact existed. If an ambiguity had remained after all of the evidence had been weighed, then and only then would the court have been justified in resolving it against Belk as a matter of law.

We hold that the errors noted above require that we reverse the judgment and remand for a new trial on the issues of plaintiff's liability for construction of additional parking spaces and for construction of an access road from Halstead Boulevard.

Defendant's argument that specific performance would be the appropriate remedy for breach of these alleged duties since money damages cannot be estimated with accuracy is well taken. However, since plaintiff's liability has not been established, we find it unnecessary to reach this issue.

In plaintiff's appeal there is no error.

In defendant's appeal on its counterclaim judgment is vacated and remanded for new trial.

Judges CLARK and WHICHARD concur.

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STATE OF NORTH CAROLINA v. ROGER ERVIN HARRISON

No. 8125SC905

(Filed 16 March 1982)

**1. Homicide § 20.1— photographs of victim's body—properly admitted**

In a prosecution for second degree murder, five photographs which portrayed various views of the room in which a victim's body was found and the body itself were admissible to illustrate the witness's testimony as to the location, position, and condition of the body at the scene.

**2. Criminal Law § 167; Homicide § 20.1— exclusion of photographs—no argument to show error**

Under App. R. 28(a), defendant's exceptions to the exclusion of certain photographs were deemed abandoned when he presented no argument to show error in the exclusion.

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**3. Homicide § 15.2— admission of opinion concerning defendant's mental state—harmless error**

The admission of a sentence in a witness's written statement which stated "I myself think this traget [sic] thing happened over the love he [defendant] had for this woman" was harmless error in view of all the evidence. G.S. 15A-1443(a).

**4. Homicide § 28— victim's propensity towards violence—instructions concerning**

In a prosecution for second degree murder, where the trial judge, instructing on self-defense, instructed that the jury "should consider the circumstances as you find them to have existed from the evidence, including . . . the reputation, if any of the deceased . . . for danger and violence," the trial court did not commit prejudicial error in failing to give defendant's requested instructions on deceased's previous acts of violence and his reputation for violence when intoxicated.

**5. Homicide § 28.4— self-defense—no duty to retreat—failure to instruct proper**

In a prosecution for second degree murder in which defendant claimed self-defense, where the evidence was insufficient to indicate that defendant was in a place from which he had no duty to retreat, the trial judge did not err in failing to give the requested instruction.

APPEAL by defendant from *Owens, Judge*. Judgment entered 5 February 1981 in Superior Court, BURKE County. Heard in the Court of Appeals 4 February 1982.

Defendant was indicted and convicted of second degree murder. He appeals from a judgment of imprisonment.

*Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.*

*Martin & Poovey, by Mark N. Poovey, for defendant-appellant.*

HILL, Judge.

The State's evidence tended to show that on 29 September 1980, defendant, Edna Davis, Marvin Edwards, Danny Carswell, Steve Huffman, and Larry Roper were present at 111 Tate Street in Morganton. About three or four o'clock that afternoon, all the parties were in the house and drinking liquor. Steve Huffman testified that at one point, he saw defendant in the bathroom, where defendant stated that Roper "was messing with Edna." Huffman then saw defendant pull a knife out of his sock and say, "Larry better leave Edna alone." By dark, Roper had passed out;

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he had been irritated and was "picking on Edna." Roper woke up, "started smart mouthing everybody," and passed out again in the living room. When he woke up, Roper grabbed Davis, called her a "slut," swung at her and hit her. Carswell testified that defendant "came in from where he was standing at the other end of the couch and came across, reached over and stabbed Larry Roper in the back," twice.

Defendant's evidence tended to show that his reputation in the community is good and that Roper's reputation in the community was that he was violent when drinking. Defendant testified that Roper woke up about ten o'clock on the evening of 29 September. After Roper called Davis names and hit her, defendant said, "I got up off the couch and Larry took a step towards me like he was going to get me. Larry grabbed me and said, 'I'll throw you in the fireplace.'" Roper went for the knife on the end table, but defendant got it first and stabbed Roper.

[1] Defendant brings forward six arguments which we will address seriatim. In his first argument, defendant contends that the trial judge erred in allowing into evidence five photographs of Roper's body, which were gruesome and excessive, depicting essentially the same scene, thereby inflaming the jurors.

"The rule is that even though photographs may be gory and gruesome, they may nevertheless be used, when properly authenticated, to illustrate a witness' testimony so long as excessive numbers of photographs are not used solely to arouse the passions of the jury and thus deny the defendant a fair trial." *State v. King*, 299 N.C. 707, 710-11, 264 S.E. 2d 40, 43 (1980). See 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 34, p. 93. Where photographs are used to illustrate a witness's testimony "as to the location, position and condition of the body at the scene and regarding the nature and extent of the wounds to the body," they are relevant and material. *State v. King*, *supra* at 711, 264 S.E. 2d at 43. The photographs are not excessive in number when they portray "somewhat different scenes." *Id. Accord State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977).

In the case *sub judice*, the five photographs admitted into evidence portrayed various views of the room in which Roper's body was found and the body itself. One photograph, taken at the morgue, shows the wounds on Roper's body. Thus, under the

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rules stated above, the trial judge did not err in allowing into evidence these photographs; they are admissible to illustrate the witness's testimony as to the location, position, and condition of the body at the scene. This assignment of error is overruled.

[2] Defendant's second argument assigns error to the trial judge's restriction of his cross-examination of Officer Ronnie Hudson concerning bloodstains he found in the Tate Street house only to those found on 29 September 1980, excluding bloodstains found at a later date. However, our review of the record reveals the following testimony by Officer Hudson:

I found blood on the mantle [sic] the night of the stabbing as well as on the mirror. *Some time later I found blood underneath the end table on the molding next to the wall. I did not look behind the sofa for blood the next day. I did not find any blood on the wall on September 29th or 30th.*

(Emphasis added.) This evidence indicates that defendant's cross-examination of Officer Hudson was not restricted, as he argues, to bloodstains found only on 29 September.

Although defendant excepts to the exclusion of certain photographs which purportedly would illustrate the bloodstains found "[s]ome time later," he presents no argument to show error in such exclusion. "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C. App. Proc. Rule 28(a). This assignment of error is overruled.

[3] In his third argument, defendant contends that the trial judge erred in allowing the jury to read a statement written by David Wakefield, a neighbor, which summarized events occurring on the night of 29 September 1980, including a conversation with defendant. The last sentence in this statement contained Wakefield's opinion that "I myself think this traget [sic] thing happened over the love he [defendant] had for this woman—Edna."

By allowing the jury to read the statement in its entirety, without deleting the last sentence, the trial judge improperly admitted the opinion of a lay witness as to the ultimate issue in the case, defendant's mental state at the time of the stabbing. Of course, "[i]t is the province of the jury to decide what inferences

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and conclusions are warranted by the testimony. *State v. Peterson*, 225 N.C. 540, 543, 35 S.E. 2d 645, 646 (1945). See generally, 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 126, p. 393.

Nevertheless, in view of all the evidence, this error is harmless. Wakefield's testimony on direct examination suggested that defendant told Wakefield that the killing was done in self-defense. On cross-examination, Wakefield was impeached with his prior inconsistent statement which suggested that defendant told Wakefield that he, defendant, was not defending himself. Considering Wakefield's testimony and other portions of his impeaching statement, we do not believe the last sentence in the statement was prejudicial. Moreover, the facts that defendant had a knife inside his sock and stated that "Larry better leave Edna alone;" that Roper called Davis a "slut;" and that Roper "messed" with Davis as well as struck her, were sufficient to establish defendant's mental state at the time of the stabbing.

In light of this and other compelling evidence, defendant has not persuaded us that the result of this trial would have been different had Wakefield's statement not been shown to the jury. He has not shown prejudicial error as required by G.S. 15A-1443(a). This argument is without merit.

[4] Defendant's fourth and fifth arguments concern the trial judge's failure specifically to charge the jury on Roper's previous acts of violence and his reputation for violence when intoxicated with the judge's charges on self-defense and the defense of others. The trial judge's charges on these issues included the following:

It is for you, the jury, to determine the reasonableness of the defendant's belief [that it was necessary to kill Roper] from the circumstances as they appeared to him at the time. *In making this determination you should consider the circumstances as you find them to have existed from the evidence, including . . . the reputation, if any, of the deceased, Larry Roper, for danger and violence . . .*

Emphasis added.)

In *State v. Cole*, 31 N.C. App. 673, 230 S.E. 2d 588 (1976), defendant Cole requested the trial judge to charge the jury as did defendant *sub judice*. The judge did not honor the request, but



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fully charged the jury on the question of self-defense and added language identical to that emphasized above. This Court held, "We do not believe that the judge's failure to instruct the jury as requested, standing alone, constitutes reversible error, especially since the trial judge otherwise fully charged on the issue of self-defense." *Id.* at 678, 230 S.E. 2d at 592.

Even so, "[c]onsidering the totality of the evidence presented, and the paucity of evidence tending to show self-defense, we do not believe 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . .'" *State v. Powell*, 50 N.C. App. 224, 228, 275 S.E. 2d 528, 531 (1981), quoting G.S. 15A-1443(a).

Here, the trial judge fully charged the jury upon the issues of self-defense and defense of others, and there is a "paucity of evidence tending to show self-defense" and defense of others. Under these circumstances, we are bound by *Cole* and *Powell*. These assignments of error therefore are overruled.

[5] In his final argument, defendant assigns as error the trial judge's failure to instruct the jury that "a person upon whom an assault is made is not obligated to retreat when he is assaulted in his dwelling house."

"[A] person is not obliged to retreat when he is assaulted while in his dwelling house or within the curtilage thereof, whether the assailant be an intruder or another lawful occupant of the premises." *State v. Browning*, 28 N.C. App. 376, 379, 221 S.E. 2d 375, 377 (1976) (emphasis added). See *State v. Sally*, 233 N.C. 225, 63 S.E. 2d 151 (1951). The evidence *sub judice* shows only that Marvin Edwards, Steve Huffman, and Danny Carswell paid to rent the Tate Street house. Defendant testified that "Steve Huffman invited Edna and me to 111 Tate Street about three or four days before the stabbing took place." This evidence is insufficient to indicate that defendant was in a place from which he had no duty to retreat, "his dwelling house." Thus, the trial judge did not err in failing to give the requested instructions.

For these reasons, we find defendant received a fair trial free of prejudicial error.

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No error.

Judges HEDRICK and BECTON concur.

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STATE OF NORTH CAROLINA v. ROSE ELLEN RUSSELL

No. 8112SC1005

(Filed 16 March 1982)

**1. Criminal Law § 79— acts and declarations of co-conspirator**

The State sufficiently established a *prima facie* case of conspiracy by defendant and her daughter to sell LSD to an undercover officer so that evidence of the daughter's actions and statements in furtherance of the conspiracy which occurred during the conspiracy were properly admitted into evidence against the defendant.

**2. Criminal Law § 34.7— evidence of other narcotics offenses—competency to show knowledge, intent or connected crimes**

In a prosecution for conspiracy to sell and deliver LSD, testimony by an undercover officer that, subsequent to a conversation with defendant about the purchase of LSD, defendant asked if he wanted to purchase marijuana and exhibited to him a room where several persons were cutting marijuana was competent to prove knowledge, intent and connected crimes.

**3. Narcotics § 3.1— reference to vegetable matter as marijuana—harmless error**

Where an officer testified that defendant offered to sell marijuana to him while holding four bags of green vegetable matter in her hands, his later inadvertent reference to the vegetable matter as marijuana was not prejudicial to defendant.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 24 April 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 March 1982.

The defendant was tried on a bill of indictment charging conspiracy to sell and deliver lysergic acid diethylamide. The State's evidence tended to show that Officer William A. Simons, an undercover narcotics officer, discussed purchasing LSD with the defendant, arranged the deal, and that the drug was delivered by defendant's daughter the following day. The defendant presented no evidence. From a sentence of 10 years imprisonment and a fine of ten thousand (\$10,000.00) dollars, defendant appealed.

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Other facts pertinent to the resolution of this appeal are contained in the opinion of the Court.

*Attorney General Edmisten by Associate Attorney Steven F. Bryant, for the State.*

*Barfield & Candors by K. Douglas Barfield, for the defendant-appellant.*

MARTIN (Robert M.), Judge.

[1] Defendant alleges in her first assignment of error that the trial court erred in allowing certain testimony concerning the "acts or declarations" of an alleged co-conspirator and in her fourth assignment that the court erred in denying defendant's motion to dismiss at the close of the State's evidence. Considering these arguments together, we disagree.

According to the general rule, when the State has introduced *prima facie* evidence of a conspiracy, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969). *State v. Tilley*, 292 N.C. 132, 138, 232 S.E. 2d 433, 438-39 (1977) explains the rule:

Before the acts or declarations of one conspirator can be considered as evidence against his co-conspirators, there must be a showing that "(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended." *State v. Lee*, 277 N.C. 205, 213, 176 S.E. 2d 765, 769-70 (1970); *State v. Conrad*, *supra* at 348, 168 S.E. 2d at 43.

The conspiracy must be established independently of the declarations or acts sought to be admitted. *State v. Wells*, 219 N.C. 354, 13 S.E. 2d 613 (1941); *Bryce v. Butler*, 70 N.C. 585 (1874). Ideally, the State should first establish a *prima facie* case for the existence of the conspiracy with extrinsic evidence and then tender the declarations and acts of the conspirators linking them to the criminal venture. This order of proof is not always feasible and can be altered. "Sometimes for the sake of convenience the acts or declarations of one are admitted in evidence before sufficient proof is given

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of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent state of the cause." *State v. Jackson*, 82 N.C. 565, 568 (1880). "Because of the nature of the offense courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide latitude in the order in which pertinent facts are offered in evidence. '[A]nd if at the close of the evidence every constituent of the offense charged is proved the verdict rested thereon will not be disturbed. . . .' (Citations omitted.)" *State v. Conrad*, *supra* at 347, 168 S.E. 2d at 43.

Applying these principles to the assignment of error raised by the defendant, we find no error in the admission of the acts and declarations of Debbie Russell. We believe the prosecution sufficiently established a *prima facie* case of conspiracy on the part of defendant and Debbie Russell to sell LSD by evidence other than that now challenged.

The State's witness, William A. Simons of the City-County Bureau of Narcotics, testified that pursuant to a conversation with Debbie Russell he went to a residence on 14 July 1980 where he met the defendant. While in the company of Debbie Russell, Angela Russell, and others, Simons asked defendant if she had any "acid" for sale. After defendant responded that she presently was without the drug, the witness further discussed the sale of LSD. Defendant stated she could obtain it and asked if Simons could call her the next day. Defendant gave Simons a telephone number and he was instructed to ask for Rose Russell. On 15 July 1980 Simons went to a shopping center where he placed a call from a phone booth to the number defendant had given him the previous day. He spoke to a person whose voice he recognized as defendant's. The defendant stated she would send Debbie Russell with the drug to meet Simons and Debbie Russell would be there in approximately five minutes. Simons testified further that after five minutes Debbie Russell arrived where Simons had been waiting.

Thereupon, the trial court instructed the jury on the admissibility of evidence relating to acts and declarations of co-conspirators. Based on the evidence presented at this point, it is reasonable to infer that an agreement had been entered to sell and deliver the LSD to Simons. As in *State v. Cooley*, 47 N.C.

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App. 376, 268 S.E. 2d 87, *disc. rev. denied*, 301 N.C. 96, 273 S.E. 2d 442 (1980), the State presents a compelling case against defendant based on the close association between defendant and Debbie Russell, the fact that both were present during conversations in which a drug deal was made, and the defendant's using Debbie Russell to exchange the drugs for money.

Thus because independent evidence established a *prima facie* case of conspiracy, all of the evidence of Debbie Russell's actions and statements in furtherance of the conspiracy which occurred during the conspiracy were properly admitted against the defendant by the trial court. *Id.* Defendant concedes that if the acts and declarations of Debbie Russell were properly admitted into evidence that sufficient evidence existed to withstand defendant's motion to dismiss at the close of the State's evidence. Considering the evidence in the light most favorable to the State, the trial court properly denied defendant's motion to dismiss. *Id.*

[2] The defendant in her second assignment of error argues that the trial court improperly allowed Officer Simons to testify concerning other distinct and independent offenses. Officer Simons testified that subsequent to the conversation with defendant about the purchase of LSD, defendant asked if he wanted to purchase marijuana. Furthermore, the witness stated defendant was seen holding plastic bags containing "green vegetable matter." Although Simons said he did not wish to buy marijuana, defendant exhibited a room where several persons were cutting the previously described material.

Defendant argues the trial court erred in allowing the testimony because the evidence showed other distinct crimes. As a general rule evidence of other offenses is inadmissible if it is only relevant to defendant's character; however, as an exception to the rule the evidence is allowed if it tends to prove knowledge, intent, or connected crimes. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

In *State v. Richardson*, 36 N.C. App. 373, 243 S.E. 2d 918 (1978), this Court allowed testimony concerning a marijuana sale by defendant in a prosecution for another sale which occurred ten days later. The Court held that "[i]n drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the

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presence and character of the drug, or presence at and possession of the premises where the drugs are found." *Id.* at 375, 243 S.E. 2d 919; *State v. Dancy*, 43 N.C. App. 208, 258 S.E. 2d 494, *disc. rev. denied*, 298 N.C. 807, 262 S.E. 2d 2 (1979). In this case the testimony was relevant and admissible, and therefore, defendant's assignment of error is without merit and is overruled.

[3] The defendant's final contention is that the trial judge committed prejudicial error in allowing Officer Simons to refer to the green vegetable matter he observed as marijuana. The testimony was as follows:

Q: What if anything was Rose Ellen Russell holding?

A: Marijuana.

MR. BRITT: Objection and move to strike.

COURT: Sustained and motion to strike is allowed.

MR. BRITT: Ask for instructions to the jury.

COURT: Ladies and gentlemen of the jury. That portion of the witness's last answer to the effect that someone was holding marijuana you will strike that from your mind and not consider it in your deliberations.

Q: When you had this conversation with Rose Ellen Russell, what if anything did she appear to be holding?

A: Green vegetable matter.

She was holding it in her hand. It was packaged in four ounce plastic bags.

...

Q: You stated earlier that you had a conversation with Rose Ellen Russell concerning the purchase of marijuana at the time Angela Russell came into the room. Is that correct?

A: Yes.

Q: At the time she was holding a bag of green vegetable matter?

A: Four bags.

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Q: Four bags? And what if any conversation did you have with Rose Ellen Russell concerning the purchase of marijuana at the time she was holding those bags?

. . .

A: I informed Rose Ellen Russell that I was not interested in buying any marijuana.

. . .

Rose Ellen Russell and myself next got up and entered the hallway. In the hallway Rose Ellen Russell told me I want to show you what I got. Rose Ellen Russell at this time opened a door leading to a second bedroom and I saw two white males and one white female cutting up what appeared to be green vegetable matter.

. . .

Q: And will you describe for the Court and the jury the activity that you saw the two white males and the white female engaged in inside the bedroom?

. . .

A: There was a table set up in the bedroom and the two white males were leaning over some green vegetable matter and when I stated before they appeared to be cutting up or separating the marijuana they seemed to be separating the stems and the seed from the green vegetable matter itself.

MR. BRITT: Move to strike.

COURT: Motion to strike is denied.

EXCEPTION: This constitutes DEFENDANT'S EXCEPTION NO. 7

Officer Simons' testimony indicated that the defendant offered to sell marijuana to him while holding four bags of the green vegetable matter in her hands. His inadvertent reference to the green vegetable matter as marijuana could in no way be prejudicial error under the facts of this case.

From the judgement appealed from we find

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No error.

Judges MARTIN (Harry C.) and WHICHARD concur.

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IN THE MATTER OF: CHARLES T. CIANFARRA, CLAIMANT-APPELLEE v. N. C. DEPARTMENT OF TRANSPORTATION, EMPLOYER-APPELLANT AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT

No. 815SC620

(Filed 16 March 1982)

**1. Master and Servant § 111— unemployment compensation—failure to except to Commission's finding—consideration of exceptions precluded**

Under G.S. 96-4(m), even though defendant was not "aggrieved" by the Employment Security Commission's conclusion in a decision involving unemployment benefits, it could have brought its exceptions to the Commission's findings before the superior court, and its failure to do so precluded consideration of the exceptions by this Court.

**2. Master and Servant § 111— unemployment compensation—Commission's conclusion unsupported by findings**

In an unemployment compensation proceeding, the superior court did not err in finding that the Commission's findings of fact did not support its conclusion that claimant was unqualified to receive benefits.

Judge CLARK dissenting.

APPEAL by defendant and the Employment Security Commission from *Rouse, Judge*. Judgment entered 7 April 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 February 1982.

This action involves the superior court's reversal of an Employment Security Commission decision to deny unemployment benefits. The matter was first reviewed by a claims adjudicator for the Commission who determined that the claimant was not disqualified. An appeal was taken to an appeals referee who determined that claimant was disqualified because he had stopped working voluntarily without cause. A deputy commissioner denied benefits on the ground set forth by the referee. Claimant then appealed to the superior court, which reversed the Commission.



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*In re Cianfarra v. Dept. of Transportation*

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Testimony at the hearing before the Commission's appeals referee showed that claimant was given notice at the end of March, 1980, that his employment with the Department of Transportation would be terminated as of 11 April 1980. The employer's evidence tended to show that the reasons for termination included the employee's repeated absences from work, accidents on the job, drinking, inability to get along with co-workers, and loss of his driver's license.

On the morning of 11 April, claimant and his supervisor argued and claimant left work at about 9:00 a.m. although he was warned that he had no leave to cover the absence and would not be paid unless he worked the rest of the day.

Claimant testified that he had worked hard, that he had gotten along with other employees and that his absences had been due to an ulcer. He claimed he did not drink before or during work and contended that a driver's license was not necessary to do his work. He admitted leaving work after the confrontation with his supervisor.

Judge Rouse found that the referee's findings were supported by the evidence but did not support a conclusion that claimant was disqualified. The Commission and claimant's former employer appeal.

*Nelson, Smith and Hall, by Alexander M. Hall, for claimant appellee.*

*Attorney General Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for appellant N.C. Department of Transportation.*

*T. S. Whitaker and Gail C. Arneke for appellant Employment Security Commission.*

ARNOLD, Judge.

The Department of Transportation (D.O.T.) brings forth three assignments of error on appeal. The Commission brings forth two assignments of error which are substantially similar to the second and third assignments of the D.O.T. and which we shall therefore combine with the D.O.T.'s contentions for purposes of this opinion.

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**In re Cianfarra v. Dept. of Transportation**

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[1] The D.O.T. first contends that the trial court erred by failing to remand this cause for further findings and conclusions by the Employment Security Commission on the question of whether claimant's misconduct was the cause for his discharge. The D.O.T. argues that the Commission failed to make findings of fact regarding D.O.T.'s evidence of claimant's misconduct, and that such findings are required by G.S. 96-15. D.O.T. further argues that it could not except to the Commission's failure at an earlier stage in the appellate process because, until the trial court reversed the Commission's conclusion favoring D.O.T. on another ground, D.O.T. was not a "party aggrieved."

While it is true that D.O.T. was not "aggrieved" by the Commission's determination, we hold that it could have brought its exceptions to the Commission's findings before the superior court, and that its failure to do so precludes consideration of the exceptions by this Court. According to G.S. 96-4(m),

"[f]rom all decisions or determinations made by the Commission or a Deputy Commissioner any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within 10 days after notice of such decision or determination, file with the Commission exceptions to the decision or the determination of the Commission, which exceptions will state the grounds of objection to such decision or determination. . . . When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence."

D.O.T.'s present appeal makes it clear that it was a "party affected" by the Commission's determinations with regard to Mr. Cianfarra's claim. Its failure to file timely exceptions, therefore, is fatal to this assignment of error.

[2] Both appellants assign error to the court's holding that the Commission's findings of fact did not support its conclusion that claimant was unqualified to receive benefits. G.S. 96-14(1) provides that an individual is not qualified for benefits ". . . if it is determined by the Commission that such individual is, at the time such

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claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer."

Claimant here was terminated by D.O.T. effective 11 April 1980. He filed for benefits 13 April 1980. At the time his claim was filed, claimant was unemployed because he had been fired by D.O.T., *not* because he left work early on 11 April 1980. We hold that Judge Rouse correctly applied the statute to the facts of this case and found that it dictated reversal.

Notwithstanding the court's use of terminology implying fact-finding, we find the "findings" were merely a summary of the case. Appellants cannot prevail on their assignment of error on this issue.

Affirmed.

Judge WHICHARD concurs.

Judge CLARK dissents.

Judge CLARK dissents.

The majority has ruled that the failure of the North Carolina Department of Transportation to bring its "exceptions to the Commission's findings before the superior court" precludes consideration of its exceptions relating to claimant's misconduct.

The Commission made no findings relating to misconduct, ruling instead that claimant was not qualified to receive benefits because he left his employment voluntarily without just cause. The Department of Transportation has been deprived of an alternative basis in law upon which a favorable judgment might be supported.

Before the Rules of Appellate Procedure became effective on 1 July 1975, there was no clear-cut procedure to protect appellees so deprived of such alternative basis in law to support a favorable judgment. Appellate Rule 10(d) introduced a new procedure whereby an appellee "may set out exceptions to and cross-assign as error any action or omission of the trial court . . . ." Before the adoption of the Appellate Rules such appellees were not parties aggrieved under G.S. 1-271. *Bethea v. Kenly*, 261 N.C. 730,

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136 S.E. 2d 38 (1964). And the Supreme Court protected on occasion an appellee in this situation by drawing on the principle that "review is to correct judgments and not reasons." *See, e.g., Jamerson v. Logan*, 228 N.C. 540, 46 S.E. 2d 561 (1948). The Appellate Rules do not apply to appeals under G.S. 96-4, but Appellate Rule 20 provides that statutes govern appeals from any agency.

I do not think that the Department of Transportation was a party "aggrieved" or "affected" within the meaning of G.S. 96-4(m). Thus, it had no right to appeal. G.S. 96-4(m), which governs appeals procedure in this case, contains no procedure for cross assignments of error or for otherwise protecting appellee's rights in this situation. There was convincing evidence to support a finding of misconduct by the claimant. The cause should be remanded for findings on this issue.

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**STATE OF NORTH CAROLINA v. TAMMY PEVIA**

No. 8116SC903

(Filed 16 March 1982)

**1. Narcotics § 1.1— delivery of marijuana—amount transferred—remuneration**

The State is not required to show both a transfer of five or more grams of marijuana and receipt of remuneration in order to submit to the jury the offense of delivery of marijuana. G.S. 90-95(a)(1), (b)(2).

**2. Narcotics § 4— delivery of marijuana—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of delivery of marijuana where it tended to show that an undercover agent gave defendant \$20 with which to purchase a \$10 bag of marijuana and some amphetamines and that defendant returned to the agent a bag of marijuana, two capsules which she said cost \$2 each, and \$6, since the transfer of marijuana for remuneration constitutes a delivery in violation of G.S. 90-95(a)(1) regardless of the amount of marijuana transferred, and the State was not required to show that defendant made a profit on the transaction.

**3. Narcotics § 4.2— possession of narcotics with intent to sell or deliver—purchase for undercover agent**

The State's evidence was sufficient for the jury in a prosecution for possession of marijuana and amphetamines with the intent to sell or deliver where it tended to show that defendant offered to purchase drugs for an undercover agent, drove with the agent to the seller's place of employment,

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left the car to meet with the seller, and returned to the car with a bag of marijuana and two amphetamines.

**4. Criminal Law § 7.1; Narcotics § 4.2— purchase of narcotics for undercover agent—no entrapment as matter of law**

In a prosecution for possession and felonious sale or delivery of marijuana and amphetamines, the State's evidence did not show entrapment as a matter of law where it showed that an undercover agent went to defendant's house to arrange for defendant's sister to purchase drugs for her; when the undercover agent learned that defendant's sister was not present, she did not suggest to defendant that defendant make the purchase instead; on her own initiative, defendant suggested that they go to a certain location to buy some drugs; when the agent declined defendant's invitation, defendant insisted that the seller would give her a good count because the seller knew her; and defendant and the undercover agent drove together to the place of employment of the seller where defendant purchased marijuana and amphetamines for the agent.

APPEAL by defendant from *Brewer, Judge*. Judgments entered 24 March 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 3 February 1982.

Defendant was convicted of possession of marijuana and amphetamines with intent to sell or deliver and felonious sale or delivery of marijuana and amphetamines. Judgments imposing prison sentences were entered.

The State's evidence tends to show the following. Twice, on 18 September 1980, an undercover agent of the Robeson County Sheriff's Department went to a house in Pembroke seeking defendant's sister. The agent had received information that defendant's sister would arrange a drug purchase for her. Each time, defendant told the agent that her sister was not there and suggested where the agent might find her. When the agent returned a third time, defendant invited the agent inside. Defendant was watching television. There were other people also present in the house.

The agent did not ask defendant to purchase drugs for her. On her own initiative, defendant suggested that they go to Dreamland to buy some drugs. The agent thought the person at Dreamland might recognize her so she declined the offer, saying Cynthia would not give her a "good count." Defendant insisted that Cynthia would give a good count because Cynthia knew the defendant.

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A companion of the agent drove the agent and defendant to Dreamland. The agent gave defendant \$20.00 and asked her to purchase a ten dollar bag of marijuana and some Eskatrols. Ten minutes later, defendant and Cynthia Hammonds emerged from the Dreamland building. It was around 10:00 p.m., and two large lights were on at the corners of the building. The agent saw the two women exchange objects. She saw a dollar bill drop to the ground which Hammonds picked up and eventually gave to the defendant.

Defendant then walked back to the car and handed the agent a clear plastic bag containing what was later identified as marijuana, and two capsules. Defendant said that the capsules had cost \$2.00 each. She returned to the agent \$6.00.

Defendant presented the following evidence. On the evening of 18 September 1980, Cynthia Hammonds was working at Dreamland. Defendant entered the building and asked her to step outside. When they were outside the building, defendant gave her a ten dollar bill to repay a five dollar loan. Miss Hammonds handed defendant back \$5.00. Miss Hammonds did not see any marijuana or amphetamines in defendant's possession.

*Attorney General Edmisten, by Assistant Attorney General Richard L. Kucharski, for the State.*

*Rogers and Bodenheimer, by Hubert N. Rogers III, for defendant appellant.*

VAUGHN, Judge.

Defendant brings forward three assignments of error. None of them discloses prejudicial error.

Defendant first argues that the judge erred in failing to dismiss the charge of sale or delivery of marijuana.

[1] G.S. 90-95(a)(1) states that it is unlawful for any person "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." G.S. 90-95(b) provides:

"(b) Except as provided in subsection (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

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. . .

(2) A controlled substance classified in Schedule . . . VI shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars (\$5,000), or both in the discretion of the court, *but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violations of G.S. 90-95(a)(1).*"

G.S. 90-95(b)(2) (1977) (amended 1979) (emphasis added). Citing the italicized portions of the statute, defendant contends that the transfer of five or more grams of marijuana *and* the receipt of remuneration for such transfer are essential elements of delivery of marijuana which the State must prove beyond a reasonable doubt. We disagree.

The offense of delivery under G.S. 90-95(a)(1) is complete when there has been a transfer of a controlled substance. *State v. Dietz*, 289 N.C. 488, 499, 223 S.E. 2d 357, 364 (1976). It is not necessary for the State to prove that defendant received remuneration for the transfer. Neither is the State initially required to prove the quantity transferred.

There is no separate statutory offense entitled delivery of marijuana. G.S. 90-95(b)(2), however, describes a situation limited in its applicability to the delivery of marijuana. If defendant transfers less than five grams of marijuana *and* receives no remuneration, he is not guilty of a delivery in violation of G.S. 90-95(a)(1).

Obviously that portion of G.S. 90-95(b)(2) will not apply to every charge of delivery of marijuana. Based on the statute's wording, if defendant transfers five or more grams of marijuana, he *is* guilty of delivery—despite the absence of remuneration. Likewise, defendant is guilty of delivery if he receives remuneration for the transfer of marijuana—regardless of the amount transferred. We, therefore, conclude that the State does *not* have to show both a transfer of five or more grams of marijuana and receipt of remuneration in order to submit to the jury the offense of delivery.

[2] On a motion for judgment of nonsuit, the court must consider evidence in the light most favorable to the State. *State v. Mad-*

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*den*, 292 N.C. 114, 232 S.E. 2d 656 (1977). In the present case, there was no testimony concerning the quantity of marijuana allegedly sold or delivered by defendant. (The marijuana that was seized, however, was introduced into evidence.) The evidence did show, moreover, that the undercover agent gave defendant \$20.00 with which to purchase a ten dollar bag of marijuana and some Eskatrols. The defendant returned to the agent a bag of marijuana, two capsules which she said cost \$2.00 each, and \$6.00.

We conclude there was ample evidence from which a jury could reasonably infer that defendant had transferred marijuana for remuneration. Contrary to defendant's assertions, the State was not required to show that defendant made a profit on the transaction. *See* Annot., 93 A.L.R. 2d 1008 (1964). Since transfer of marijuana for remuneration constitutes a delivery in violation of G.S. 90-95(a)(1)—regardless of the amount transferred—the court properly denied defendant's motion to dismiss. Defendant's assignment of error is overruled.

[3] Defendant next argues that the court erred in denying her motion to dismiss the charge of possession of marijuana and amphetamines with the intent to sell or deliver. Defendant contends that the State's evidence showed that she acted only as an agent. She contends there was no evidence that she had possession of the controlled substances. We disagree.

An accused has possession of a controlled substance within the meaning of G.S. 90-95(a)(1) when he has both the power and the intent to control its disposition or use. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Keeter*, 42 N.C. App. 642, 257 S.E. 2d 480 (1979). Possession does not require ownership of the controlled substance. Annot., 91 A.L.R. 2d 810 (1963).

Viewing the present evidence in the light most favorable to the State, we conclude the court properly denied defendant's motion to dismiss the charge of possession with intent to sell or deliver. The evidence shows that defendant offered to purchase drugs for an undercover agent, drove with the agent to Dreamland, left the car to meet with Cynthia Hammonds, and returned to the car with a bag of marijuana and two pills.

The fact that defendant acted as a "go-between" is immaterial. *See State v. Davis*, 38 N.C. App. 672, 248 S.E. 2d 883 (1978).



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She was aware of the drugs' presence on her person. She had custody and control of the marijuana and amphetamines from the time she met with Miss Hammonds until she returned to the car. She knew that the agent wanted to purchase the controlled substances. A jury could reasonably infer from such evidence that defendant possessed the marijuana and amphetamines with the intent to sell or deliver. Furthermore, evidence that a sale or delivery actually occurred was sufficient evidence for the jury to infer that defendant had possession with the intent to sell or deliver. *State v. Lankford*, 31 N.C. App. 13, 18, 228 S.E. 2d 641, 645 (1976). Defendant's assignment of error is overruled.

[4] Defendant's third assignment of error is the court's denial of her motion to dismiss all charges on the ground that the evidence showed entrapment as a matter of law.

The defense of entrapment requires proof of two essential elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime; and (2) origin of the criminal design in the minds of the government officials rather than in the mind of the innocent defendant. *State v. Grier*, 51 N.C. App. 209, 275 S.E. 2d 560 (1981). The defense is usually a jury question. "The court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take." *State v. Stanley*, 288 N.C. 19, 32, 215 S.E. 2d 589, 597 (1975), quoting *State v. Campbell*, 110 N.H. 238, 241, 265 A. 2d 11, 14 (1970).

In the present cause, defendant offered no evidence on the issue of entrapment. Any finding of entrapment, therefore, must be compelled by the State's evidence. According to the undercover agent's testimony, she originally went to defendant's house with the intent to purchase drugs from defendant's sister. When she learned that defendant's sister was not present, she did not suggest to defendant that she make the purchase instead. Defendant was the one who initially raised the possibility of a drug purchase. Defendant knew exactly where to go and whom to see. When the agent declined defendant's invitation, defendant "insisted that Cynthia would give her a good count because Cynthia knew her."

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When an officer does no more than provide the opportunity for defendant to commit an offense, there is no entrapment. *State v. Davis*, 38 N.C. App. 672, 248 S.E. 2d 883 (1978). The present evidence did not compel a finding of entrapment as a matter of law. Defendant's assignment of error is overruled.

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. CHARLIE NATHANIEL BROWN

No. 813SC1066

(Filed 16 March 1982)

**1. Criminal Law § 122.2— inability to reach verdict—further instructions proper**

The trial judge did not err in giving additional instructions which closely paralleled those set out in G.S. 15A-1235 upon a jury's retiring for deliberation for approximately three hours and returning indicating an inability to reach a verdict. G.S. 15A-1235 is the proper reference for the standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict, and prefacing his remarks with "in view of the time that was spent trying the case, and although you had indicated you had not reached a verdict," did not have a coercive or prejudicial effect.

**2. Criminal Law § 112.2— instructions on reasonable doubt proper**

The trial judge was not required to give instructions on reasonable doubt in the exact language of the defendant's request, and the reasonable doubt instructions were proper where the jury was charged, in substance, that they should consider and weigh all of the evidence as well as lack of evidence in determining whether there was reasonable doubt of defendant's guilt.

APPEAL by defendant from *Small, Judge*. Judgment entered 12 March 1981 in Superior Court, PITT County. Heard in the Court of Appeals 9 March 1982.

The defendant was indicted for the armed robbery of Bobby Baker and was found guilty as charged by the jury. From a sentence of a minimum of 10 years and a maximum of 20 years imprisonment, defendant appealed.

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State v. Brown

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*Attorney General Edmisten by Assistant Attorney General William F. Briley for the State.*

*Appellate Defender Adam Stein by Assistant Appellate Defender Nora B. Henry for the defendant-appellant.*

MARTIN (Robert M.), Judge.

[1] The defendant first argues that the judge's instructions to the jury coerced a verdict in violation of N.C. Gen. Stat. § 15A-1235. We disagree.

The jury in this case retired for deliberation at 2:38 p.m. The jurors returned to the courtroom at 5:17 p.m. and handed the blank verdict sheet to the court. The following dialogue occurred between the court and the jury foreman:

THE COURT: The Sheriff indicates to me that you have been unable to reach a verdict at this point. Is that the message you all sent me?

JURY FOREMAN: Yes, sir.

The court was then recessed overnight. Upon the jury's return in the morning the following occurred:

THE COURT: Let me ask you this, Mr. Butler—I believe you stated you were the foreman?

MR. BUTLER: Yes, sir.

THE COURT: Do you or does any other member of the jury have any question that you wish to ask the court that if the court could answer may help you in the course of your deliberations?

(No questions.)

THE COURT: I realize that you all deliberated a little less than three hours yesterday afternoon. But in view of the time that was spent trying the case, and although you had indicated you had not reached a verdict, I would like to say this to you. Although your verdict must be unanimous, that is, all 12 of you must agree to whatever verdict you return, I want to instruct you that you have a duty to consult with one another and to deliberate with a view to reaching an agree-

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ment if it can be done without violence to an individual's judgment. Each juror must decide the case for himself but only after an impartial consideration of the evidence with his fellow jurors. In the course of your deliberations a juror should not hesitate to reexamine his own views or change his mind if convinced his original opinion is erroneous. No juror should surrender his honest conviction as to the weight of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict. Now, I will tell you, I do not intend to coerce a verdict out of you either way. It would be improper for me to do so. But in view of the length of time that we did spend trying the case, I do feel that I should give you those instructions and let you consider the matter. Now, after you have done so, if you are unable to resolve your differences, or if you develop some questions you wish to ask the court, then come back in and let me know.

Within an hour, the jury returned with a guilty verdict.

N.C. Gen. Stat. § 15A-1235 is the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). The statute borrows from standards approved by the American Bar Association. The Official Commentary to the statute indicates that the Criminal Code Commission deleted a provision which would have authorized the judge to inform the jurors that if they did not agree upon a verdict, another jury may be called upon to try the case. N.C. Gen. Stat. § 15A-1235, Official Commentary; *State v. Easterling*, *supra*. N.C. Gen. Stat. § 15A-1235 provides in pertinent part:

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

- (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

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- (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
- (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

The defendant relies on *State v. Easterling*, *supra* at 606, 268 S.E. 2d 808 (1980), where the court was dealing with an additional instruction specifically stating that failure to reach a verdict would require “. . . another week or more of the time of the Court that will have to be consumed in the trial of these actions again. . . . and another jury will have to be selected to hear the case or these cases, and the evidence again.” In the present case the instructions of the trial judge closely paralleled those set out in N.C. Gen. Stat. § 15A-1235. The trial judge did not mention a retrial with its attendant expense and inconvenience, but just mentioned the length of time spent trying the case as a prelude to the additional instructions. Reading the charge in its entirety, there is no coercive or prejudicial effect.

In addition there was no evidence in this case that the jury was deadlocked. The court in *Easterling*, while finding error, concluded that a new trial was not required due to the fact that while the erroneous instruction was given after the jury had begun its deliberations, it was given before the jury had returned announcing any deadlock. *State v. Lipfird*, 302 N.C. 391, 276 S.E. 2d 161 (1981). Similarly in this case, there was not the slightest indication that the jury was deadlocked. Thus even if the charge itself was in part impermissible under N.C. Gen. Stat. § 15A-1235,

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its use did not prejudice defendant in the case before us. *State v. Lipfird, supra*; *State v. Easterling, supra*.

[2] The defendant's remaining assignment of error concerns the failure of the trial judge to give the requested instructions on reasonable doubt. Before trial the defendant requested the following instruction:

*Burden of Proof and reasonable doubt.* The defendant has entered a plea of "not guilty." The fact that he has been indicted is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty", he is not required to prove his innocence; he is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

The general rule in North Carolina is that a charge to the jury must be construed in its entirety. In this case the judge instructed the jury:

Under our system of justice when a defendant pleads not guilty he is not required to prove his innocence. The defendant is presumed to be innocent. This presumption goes with him throughout the entire trial and until the jury is convinced of his guilt beyond a reasonable doubt.

Now, the term beyond a reasonable doubt does not mean beyond all doubt. Neither does it mean beyond some vain, imaginary or fanciful doubt, but rather it means exactly what that term implies. A reasonable doubt is a doubt based upon common sense and reason, a doubt generated by the insufficiency of the proof.

He further instructed that with respect to believable evidence, the jury must "determine the importance of that evidence in light of all other believable evidence presented during the trial." Later the court instructed, "[i]f after weighing all of the testimony you are not satisfied beyond a reasonable doubt that the defendant

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was the perpetrator of the crime charged, it would be your duty to return a verdict of not guilty.”

Assuming the requested instruction is correct and is supported by the evidence, the trial judge is not required to give the instructions in the exact language of the request. He must only give the instruction in substance. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). Here a contextual reading of the charge shows that the jury, in substance, was instructed they they should consider and weigh all of the evidence as well as lack of evidence in determining whether there was reasonable doubt of defendant's guilt. This assignment of error, therefore, is without merit and is overruled.

The defendant had a fair trial free from prejudicial error.

No error.

Judges MARTIN (Harry C.) and WHICHARD concur.

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STATE OF NORTH CAROLINA v. BENNY C. WHILHITE AND JOHN EDGAR RANKIN

No. 8118SC910

(Filed 16 March 1982)

**1. Criminal Law §§ 77.3, 92.5— codefendant's statement implicating defendant—testimony by codefendant at trial—election by State not required**

The State was not required to make the election provided by G.S. 15A-927(c)(1) because a codefendant made an out-of-court statement implicating defendant where the codefendant testified at the joint trial and was subject to cross-examination by defendant.

**2. Criminal Law § 89.5— variances in corroborating testimony—necessity for objection**

The trial court did not err in admitting a witness's out-of-court statement for the purpose of corroborating the witness's trial testimony, although the corroborative statement contained a clearer indication of defendant's specific intent to shoot a robbery victim than did his trial testimony, where the statement substantially corroborated the trial testimony, and where defendant objected to an entire section of the corroborative statement, most of which was competent, and failed to point out the objectionable parts.

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**3. Homicide § 21.7— second degree murder—sufficiency of evidence to show malice or intent**

There was sufficient evidence of malice and intent to support defendant's conviction of second degree murder where the State's evidence tended to show that, although defendant did not actually pull the trigger of the gun which killed the victim, he qualified as a principal in the second degree in the commission of the crime.

**4. Robbery § 4.3— armed robbery—sufficiency of evidence—shooting of victim before robbery**

An armed robbery conviction was not improper because the victim was first shot and then robbed.

APPEAL by defendant Rankin from *Albright, Judge*. Judgment entered 27 March 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 February 1982.

Defendant was charged in bills of indictment with armed robbery and second degree murder.

State's evidence tended to show that defendant and three companions, Benny Whilhite, Alvin White, and Richard Patterson, went to a Greensboro "liquor house" on the evening of 25 November 1980. Hostility developed between Patterson and Whilhite and Whilhite was heard telling defendant "he was going to rob the old man, Mr. Patterson." At one point, defendant drew a gun against Mr. Patterson and asked "what he was doing with his hands in his pockets."

At about 1:30 a.m., the four men left in Mr. Patterson's car with defendant driving. White was in the front seat with defendant; Whilhite and Mr. Patterson were in the back seat. While they were driving, defendant passed a gun to Whilhite. Holding the gun on Patterson, Whilhite said "[O]ld man you think this is a game, but it's not." The gun then discharged, shooting Patterson. The victim's request that he be taken to a hospital was ignored and he died a short time later. Whilhite took \$10 and a set of keys from the body.

After parking a short distance from Mr. Patterson's apartment, defendant, Whilhite and White abandoned the car with Mr. Patterson's body inside. Using the keys stolen from the victim's body, the three men gained entry to Patterson's apartment where additional items were stolen.



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The jury returned a verdict of guilty against defendant on both charges. He was sentenced to a consolidated term of forty to sixty years in prison. Defendant appeals.

*Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.*

*Moses and Murphy, by Pinkney J. Moses, for defendant appellant.*

ARNOLD, Judge.

[1] Defendant's first assignment of error is that the trial court erred in allowing a joint trial of defendant and Whilhite and in not requiring the State to make the election required by G.S. 15A-927(c)(1) when defendant objected to joinder and moved for severance. The statute on which defendant relies provides that:

(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

- a. A joint trial at which the statement is not admitted into evidence; or
- b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
- c. A separate trial of the objecting defendant.

While the statute clearly dictates an election where its provisions are found to apply, this Court has held that the election requirement is inapplicable where the codefendant testifies. *State v. Johnston*, 39 N.C. App. 179, 249 S.E. 2d 879 (1978), *cert. denied* 296 N.C. 738, 254 S.E. 2d 179 (1979). In explaining this exception, the Court noted in *Johnston* that:

G.S. 15A-927(c)(1) codifies substantially the decision in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), which held that the receipt in evidence of the confession of one co-defendant posed a substantial threat to the

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**State v. Whilhite**

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other co-defendant's Sixth Amendment right of confrontation and cross-examination because the privilege against self-incrimination prevents those who are implicated from calling the defendant who made the statement to the stand. *Id.* at 182, 249 S.E. 2d 881.

Thus, since the defendant here was able to cross-examine Whilhite at trial concerning his out-of-court statement, the trial court correctly found that G.S. 15A-927(c)(1) did not apply and no election was required.

Defendant further argues that the trial court's refusal either to suppress Whilhite's statement or to sever the trial was an abuse of discretion. The court's instruction that the statement was to be considered for impeachment purposes only was insufficient, according to defendant, to prevent prejudicial effect. In view of the cumulative nature of the evidence against defendant, and of the proper limiting instruction given by the court, we find no prejudicial error to defendant.

[2] Defendant next assigns as error the court's admission into evidence of certain portions of an out-of-court statement by Alvin White to Detective Baulding which were not corroborative of White's previous testimony.

It is true that the corroborative statement contained a clearer indication of Whilhite's specific intent to shoot Patterson than did White's testimony in court. However, the pretrial statement was largely corroborative and the judge instructed the jury to consider it only for corroborative purposes. "Where testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E. 2d 89, 92 (1980).

Furthermore, the defendant's objection was apparently to an entire section of the corroborative testimony, most of which was, in fact, competent. Where corroborative testimony contains variances which are arguably incompetent, it is the defendant's responsibility to point out the objectionable portion. "Objections to testimony *en masse* ordinarily will not be sustained if any portion is competent. . . ." *State v. Lester*, 294 N.C. 220, 230, 240 S.E. 2d 391, 399 (1978). It is the responsibility of the jury to

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decide whether proffered testimony is, in fact, corroborative and to consider it only to the extent that it is corroborative. *State v. Rogers, supra*. We find no error in view of the court's limiting instruction.

[3] Defendant's third assignment of error is that the trial court improperly denied defendant's motion to dismiss the charge of second degree murder in that the State had failed to show malice or intent to injure. We disagree.

It is not necessary, where the charge is second degree murder, for the State to prove the defendant intended the ultimate result of his actions. It need only show that the death resulted from intent to do "any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty. . . ." *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E. 2d 905, 917 (1978). Applying this standard to the case at bar, we find there was abundant evidence of malice and intent to support a second degree murder conviction. While the appellant here was not the defendant who actually pulled the trigger, he certainly qualifies as a second degree principal in the commission of the crime and, as such, is equally liable under North Carolina law. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Defendant's motion to dismiss the second degree murder charge was properly denied.

[4] Defendant also assigns as error the judge's denial of his motion to dismiss the charge of armed robbery. We find this assignment of error to be wholly without merit.

There was evidence that defendant Rankin was a knowing participant in acts committed in furtherance of Whilhite's express plan to rob Mr. Patterson. Indeed, he supplied Whilhite with the gun used to accomplish the robbery. The defendant's suggestion that the armed robbery conviction should fail because the victim was first shot and then robbed is amusing but untenable. Clearly, the gun was used to accomplish the robbery of Mr. Patterson. We find no error in submission of the armed robbery charge to the jury.

Finally, defendant asserts the trial court improperly charged the jury concerning second degree murder.

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**Housing Authority v. Kirkpatrick & Associates**

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We have reviewed the jury charge and find that it closely parallels the *Wilkerson* definition of malice and intent. Furthermore, we find that the trial judge specified the necessity for commission of an intentional act to support an inference of malice. We find no error.

Defendant's final assignment of error claiming improper denial of his motion to dismiss and his motion for a new trial is without merit.

In the trial of defendant we find

No error.

Judges CLARK and WHICHARD concur.

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GREENSBORO HOUSING AUTHORITY v. KIRKPATRICK & ASSOCIATES,  
INC. v. TALLEY ELECTRIC COMPANY

No. 8118SC493

(Filed 16 March 1982)

**Contracts § 21.2; Professions and Occupations § 1— construction contract—housing project damaged by fire—architect and engineers as agents of owner**

In a contract action in which plaintiff sought to recover damages caused by a fire in a housing project, the trial court did not err in entering judgment of involuntary dismissal at the close of plaintiff's evidence. The evidence indicated that plaintiff employed Raymond Smith to work with the architect in planning the project and assuring compliance with contract documents; that Smith, the architect, and the engineer were on the jobsite regularly during construction; that plaintiff and the architect executed a "Certificate of Completion" on the project; and that work was performed as contracted in accordance with the plans and specifications. The evidence thus supported the findings and legal conclusions that any knowledge of Smith, the architect, and the engineer was imputed to plaintiff, and that there was no breach of contract by defendants. G.S. 1A-1, Rule 41(b).

APPEAL by plaintiff from *Walker, Judge*. Judgment entered 20 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 January 1982.

Plaintiff sought from its general contractor on a housing project, defendant Kirkpatrick & Associates, Inc. (hereafter

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**Housing Authority v. Kirkpatrick & Associates**

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Kirkpatrick), damages caused by a fire in the project. Kirkpatrick sought from its electrical subcontractor on the project, third-party defendant Talley Electric Company (hereafter Talley), recovery over of any sums recovered from it by plaintiff.

The court, sitting without a jury, entered judgment of involuntary dismissal at the close of plaintiff's evidence. Plaintiff appeals.

*James R. Turner for plaintiff appellant.*

*Block, Meyland & Lloyd, P.A., by Michael R. Pendergraft, for defendant appellee Kirkpatrick & Associates, Inc.*

*Smith, Moore, Smith, Schell & Hunter, by Stephen P. Millikin and Maureen J. Demarest, for third-party defendant appellee Talley Electric Company.*

WHICHARD, Judge.

The court based its involuntary dismissal on conclusions that (1) no breach of contract occurred, and (2) if any breach occurred, it could have been discovered by plaintiff in the exercise of reasonable diligence. Its findings of fact, which are supported by competent evidence, sustain its conclusions. We therefore affirm.

The essential facts are:

Plaintiff contracted with Kirkpatrick for the construction of a housing project according to plans and specifications provided by plaintiff's architects. Kirkpatrick subcontracted the electrical construction to Talley.

Plaintiff employed Raymond Smith to work with the architect in planning the project and assuring compliance with the contract documents. The architects, with at least implied approval by plaintiff, employed a consulting electrical engineer to handle installation of the electrical work. Smith, the architects, and the engineer were on the jobsite regularly during construction. Smith prepared several "punch lists" of incomplete items which were eventually completed to his and the architects' satisfaction. On 26 September 1975 plaintiff and the architects executed a "Certificate of Completion" on the project.

On 21 December 1976 fire destroyed a portion of the project. Plaintiff alleged the cause was "a loose connection in the busway

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**Housing Authority v. Kirkpatrick & Associates**

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joint"; that Kirkpatrick "constructed and installed the busway in a manner that did not allow any access to the busduct joints"; and that Kirkpatrick's "failure to allow sufficient access" and "failure to discover the same" violated the contract requirements. Following the fire Smith discovered maintenance requirements as to the busduct by removing a plate from the duct. Prior thereto plaintiff had been unaware of these requirements. Smith, however, was on the jobsite regularly while the busducts were being installed; was aware that the closets which housed the busducts were being erected; "saw the busduct materials as they were erected" and "probably saw the closets being constructed"; did not register any objection during the course of construction "about the size of the closets"; and ultimately "satisfied [him]self" regarding construction of the busduct system.

The court found as facts that (1) the architects, by contract with plaintiff, were to be responsible for the supervision and inspection of the project; (2) the architects contracted with the engineer, with plaintiff's awareness and approval, to supervise and inspect the electrical system; and (3) Smith was employed by plaintiff, *inter alia*, "to ensure proper construction in accordance with the contract documents, including observation of the work as it progressed." These findings are supported by competent evidence and are thus conclusive on appeal. *Williams v. Liles*, 31 N.C. App. 345, 229 S.E. 2d 215 (1976); *McNeely v. Railway Co.*, 19 N.C. App. 502, 199 S.E. 2d 164, *cert. denied*, 284 N.C. 425, 200 S.E. 2d 660 (1973).

An agent is one who, by the authority of another undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute, or deputy, appointed by his principal primarily to bring about business relations between the latter and third persons.

*SNML Corp. v. Bank*, 41 N.C. App. 28, 36, 254 S.E. 2d 274, 279, *disc. review denied*, 298 N.C. 204 (1979). The above findings place the architects and Smith within the above definition of "agent." In addition, plaintiff stipulated that the architects were its agents. "As a general rule, . . . as regards the performance of his supervisory functions with respect to a building under construction, [an architect] ordinarily acts as the agent and representative

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**Housing Authority v. Kirkpatrick & Associates**

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of the person for whom the work is being done." 5 Am. Jur. 2d, Architects, § 6, p. 668. The architects' contract with the engineer, which was at least impliedly approved by plaintiff, established an agency relationship between plaintiff and the engineer, because "the relation of agency exists between the principal and an authorized subagent." 3 Am. Jur. 2d, Agency, § 154. The above findings thus support the legal conclusion that Smith, the architects, and the engineer were agents of plaintiff.

The general rule is that a principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends, although the agent does not in fact inform his principal thereof.

*Ward v. Swimming Club*, 27 N.C. App. 218, 220, 219 S.E. 2d 73, 75 (1975). The findings thus support the further legal conclusion that any knowledge of Smith, the architects, and the engineer, was imputed to plaintiff.

The court further found as facts that: (1) the work was completed and accepted by plaintiff, (2) a Certificate of Completion was executed by the architects and plaintiff stating that the work was completed in accordance with the requirements of the specifications and the drawings and the contract for the work; (3) Smith had certified that the work was performed or supplied in accordance with the drawings and specifications, the terms and conditions of the contract, and duly authorized deviations, substitutions, alterations, and additions, all of which were duly approved; and (4) the electrical closets and busducts were constructed in accordance with the architectural drawings as prepared by the architects and engineers and as inspected by them. Smith testified that "[t]he project was constructed in substantial conformance to the plans and specifications . . ." He further testified that the closets which housed the busducts "were built in accordance with [the architects'] plans"; and that he did not register any objection with the architects or the engineer during the course of construction about the size of the closets. This and other competent evidence supports the foregoing findings, and they thus are conclusive on appeal. Williams, *supra*; McNeely, *supra*.

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This Court recently adopted the rule that "where a contractor is required to and does comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications." *Bd. of Education v. Construction Corp.*, 50 N.C. App. 238, 241, 273 S.E. 2d 504, 506-507, *disc. review improvidently granted*, see 304 N.C. 187, 282 S.E. 2d 778 (1981). See also 13 Am. Jur. 2d, Building and Construction Contracts, § 28; Annot., 6 A.L.R. 3d 1394 (1966 & Supp. 1981). The foregoing findings, supported by competent evidence, that work was performed as contracted in accordance with the plans and specifications, and that plaintiff and its agents certified acceptance thereof, thus support the legal conclusion that there was no breach of contract by defendants. The court's further conclusion that if any breach occurred it could have been discovered by plaintiff by the exercise of reasonable diligence is likewise supported by its findings, which in turn are supported by competent evidence.

The court, sitting as the trier of fact, found facts, based on competent evidence, which rendered proper allowance of the motion for involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b). Accordingly, plaintiff's assignments of error are overruled; and the judgment allowing the motion to dismiss is

Affirmed.

Judges CLARK and BECTON concur.



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**Leonard v. Pell**

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JERRY R. LEONARD AND DORIS M. LEONARD v. BETTY A. PELL, HUGH R. ANDERSON, SUBSTITUTED TRUSTEE UNDER A DEED OF TRUST TO G. E. MILLER FOR RANDOLPH SAVINGS AND LOAN ASSOCIATION DATED OCTOBER 23, 1967 AND RECORDED IN BOOK 962, PAGE 435, RANDOLPH COUNTY REGISTRY ASSIGNED TO THE FIRST NATIONAL BANK OF RANDOLPH COUNTY, THE FIRST NATIONAL BANK OF RANDOLPH COUNTY, AND B. DOYLE CRAVEN

No. 8119SC673

(Filed 16 March 1982)

**Mortgages and Deeds of Trust §§ 36, 40— foreclosure sale—no tender of payment—waiver of right to attack**

In an action to set aside a foreclosure sale, affidavits presented at the hearing on a motion for summary judgment failed to show that plaintiffs or an agent for plaintiffs tendered payment of the obligations secured by the deed of trust prior to the sale. Furthermore, plaintiffs ratified the foreclosure sale by endorsing a check for the surplus from the sale so that the surplus proceeds could be applied to plaintiffs' other debts.

APPEAL by plaintiffs from *Wood, Judge*. Judgment entered 12 February 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 4 March 1982.

Plaintiffs appeal the granting of summary judgment in favor of defendants in a suit arising out of the foreclosure and sale of plaintiffs' house and lot under a deed of trust.

On 23 October 1967 plaintiffs executed a first deed of trust on their property, in the amount of \$11,000, to G.E. Miller, Trustee for Randolph Savings and Loan Association, which was subsequently assigned to defendant First National Bank of Randolph County. A foreclosure proceeding was instituted against plaintiffs on the first deed of trust for nonpayment of installments due; plaintiffs were personally served notice of hearing but did not appear, and on 13 July 1979 the clerk of superior court entered an order authorizing the sale. However, on 6 August 1979 the defendant trustee, Hugh R. Anderson, received notice from the United States District Court for the Middle District of North Carolina that the plaintiffs had filed a Chapter 13 bankruptcy proceeding. The bankruptcy judge had entered an order restraining the advertised sale of plaintiffs' property.

At the bankruptcy hearing the court approved the following plan: "This plan is confirmed to pay all creditors in full due to the

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**Leonard v. Pell**

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equity in the real estate." Plaintiffs were given until 30 November 1979 to locate a purchaser for the real estate. On 5 December 1979 a further hearing was held and the bankruptcy judge entered an order granting plaintiffs an additional sixty days to locate a purchaser for their property. If a purchaser could not be found by that time, the restraining order prohibiting foreclosure would automatically terminate and The First National Bank of Randolph County would be permitted to proceed with the foreclosure. The bankruptcy court released plaintiffs' property for foreclosure on 11 February 1980 upon failure of plaintiffs to comply with the order.

Plaintiffs were notified of the hearing with respect to the foreclosure proceedings, held 6 March 1980, and at this time the clerk authorized the defendant trustee to proceed with the foreclosure. Plaintiff Doris M. Leonard gave notice of appeal to superior court. At the hearing before Judge Walker, neither of the plaintiffs nor a representative was present. Judge Walker authorized the defendant trustee to proceed with the sale, which took place 9 April 1980. On 11 April 1980, defendant trustee was ordered to resell the property, after an upset bid had been filed. The defendant trustee alleged that on the same day, plaintiff Jerry Leonard entered his office with a friend who expressed an interest in purchasing the property. They were advised to contact their respective attorneys. The second sale took place 29 April 1980. On 25 June 1980 a deed was delivered to the purchaser and the funds from the sale, \$24,000, were disbursed to various creditors, including defendant bank, and plaintiffs.

Plaintiffs instituted the present action on 26 June 1980, alleging fraud and tender of payment and asking that the deed of the trustee, Hugh R. Anderson, be set aside and declared null and void. In his affidavit, plaintiff Jerry Leonard stated that during the pendency of the sale, he asked James Mason, his employer, to help him keep his house; that Mason told Hugh Anderson that "he was prepared to pay the monies due to clear the title on the house and take title himself"; and that Mr. Anderson "told him there was nothing that could be done and further talk would be useless."

James Mason, by affidavit, stated that he and Mr. Leonard developed a proposed plan whereby Mason would pay \$13,600 for

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the property if he could obtain an unencumbered fee simple deed. After talking with Mr. Anderson, Mason learned that there were liens of record other than a first and second deed of trust and for this reason he did not tender payment, but chose instead to ask his attorney to investigate the matter. Thereafter he "ceased all further efforts to secure purchase of the property" or to assist Jerry Leonard in any way.

*Robert F. Polson and E. L. Alston, Jr. for plaintiff appellants.*

*Smith, Casper & Smith, by Charlie B. Casper, for defendant appellees Hugh R. Anderson, Substituted Trustee, The First National Bank of Randolph County, and B. Doyle Craven.*

*T. Worth Coltrane for defendant appellee Betty A. Pell.*

MARTIN (Harry C.), Judge.

Although defendants assign as error the trial court's refusal to dismiss the appeal, we choose to decide the case upon the merits.

Judging from the record before us, it is evidently plaintiffs' contention that an issue of fact exists with respect to tender of payment, and thus summary judgment was improperly granted. Plaintiffs do not allege that they, themselves, tendered payment of the obligation secured by the first deed of trust. The fact that they had declared bankruptcy reinforces this presumption. There is no evidence that James Mason was acting as agent for plaintiffs. The affidavits disclose that he was interested in purchasing the property for himself. Mason categorically denied tender of payment. The record does not support plaintiffs' contention.

Moreover, the record discloses that on 25 June 1980, one day before plaintiffs instituted this action, a check in the amount of \$3,474.74 was paid to the order of Jerry R. Leonard, Doris M. Leonard and Anita Jo Kinlaw, Standing Trustee, Wage Earner Plan, B-79-01169 and B-79-01170. Plaintiffs endorsed this check, representing the surplus from the foreclosure sale, and the moneys were applied to other of plaintiffs' debts.

It has been held that acceptance of a surplus derived from a foreclosure sale waives the right of the mortgagor to attack the foreclosure. *Flake v. Building and Loan Association*, 204 N.C. 650,

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169 S.E. 223 (1933); 55 Am. Jur. 2d Mortgages § 665 (1971). By endorsing the check and reaping the benefits of the surplus toward the satisfaction of other debts, plaintiffs elected to ratify the sale. They may not now treat the sale as a nullity and have it set aside, or sue the trustee for wrongfully conducting the sale. *Flake, supra*.

We hold that the trial court was correct in finding no triable issue of fact. *Hotel Corp. v. Taylor* and *Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980).

Affirmed.

Judges MARTIN (Robert M.) and WHICHARD concur.

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MYRLENE K. GANTT (HAYES), EMPLOYEE, PLAINTIFF v. EDMOS CORPORATION, EMPLOYER; EMPLOYERS INSURANCE OF WAUSAU, CARRIER; DEFENDANTS

No. 8110IC492

(Filed 16 March 1982)

**1. Master and Servant § 91— workers' compensation—insufficient notice of claim—no jurisdiction in Commission**

The Industrial Commission properly concluded that it lacked jurisdiction over a workers' compensation action due to the fact that a claim was not filed with the Commission within two years after plaintiffs' accident as required by G.S. 97-24(a). A letter from plaintiff's attorney, written approximately 18 months after plaintiff's accident, failed to assert in any way that plaintiff was demanding compensation or that action by the Commission was necessary to settle plaintiff's claim against defendant.

**2. Master and Servant § 91— workers' compensation—defendants not estopped to plead statute of limitations as defense**

Defendants were not estopped to plead G.S. 97-24, the two-year statute of limitations for filing workers' compensation claims before the Commission, where there was evidence that defendants paid plaintiff's medical bills, conducted settlement negotiations before and after the expiration of the two-year time limit for filing claims, and where there was no evidence that defendants lulled plaintiff into believing a claim need not be filed or that defendants expressly or impliedly agreed not to plead G.S. 97-24.

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**Gantt v. Edmos Corporation**

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APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 23 February 1981. Heard in the Court of Appeals 7 January 1982.

The facts in this case are uncontroverted. On 9 July 1976 plaintiff sustained an injury by accident arising out of and in the course of her employment by defendant Edmos Corporation when her hand was caught in a machine and injured in the area between the wrist and knuckles. Plaintiff's medical expenses from the accident were paid by defendants until November 1979, and plaintiff also received temporary total disability compensation from defendants for the period of time that she was unable to work. In July 1977 plaintiff's attorney wrote defendant-carrier that in his opinion plaintiff was entitled to further compensation for a scar left on her hand as a result of the accident. In its response the carrier recommended that they await the final report of plaintiff's doctor before making a determination as to any further benefits to which plaintiff might be entitled. On 20 January 1978 plaintiff's attorney wrote the following letter to the carrier, with a copy to the Industrial Commission:

"My client is still under the doctor's care in connection with the industrial injury. I have been advised that Dr. Jarman and all hospital bills have been paid to date which the employee incurred because of the industrial injury.

However, the Lincoln Drugs, Inc. bill which was prescribed by Dr. Jarman has not been paid and, accordingly, I am enclosing a statement for payment.

As soon as the doctor has reached some conclusion concerning this hand, I will be back in touch with you."

In a letter dated 5 June 1978 the carrier informed plaintiff's attorney that a disability rating had been assigned to plaintiff by her doctor and of the amount of additional compensation to which the rating entitled plaintiff. The carrier offered to forward a check for said amount as soon as the enclosed Form 26 Agreement as to Payment of Compensation had been executed and returned by plaintiff. On 18 July 1978 plaintiff's attorney wrote to the carrier, with a copy to the Industrial Commission, that plaintiff was unwilling to accept the amount offered for her disability and that it was his recommendation that the matter be placed on

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**Gantt v. Edmos Corporation**

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for hearing at the next session of the Industrial Commission. From July 1978 through October 1979 the carrier continued to correspond with plaintiff's attorney in an effort to settle the claim. On 5 March 1980, plaintiff's attorney wrote to the Industrial Commission requesting that the matter be set for hearing at the next session.

At a hearing on 21 November 1980 Deputy Commissioner Scott found and concluded that the Industrial Commission lacked jurisdiction over the action due to the fact that no claim was filed with the Commission within two years after the accident, and that defendants were not estopped to plead G.S. 97-24 as a defense to plaintiff's claim. The action was dismissed by Deputy Commissioner Scott, and the Full Commission affirmed. Plaintiff appeals.

*Don M. Pendleton for plaintiff appellant.*

*Hedrick, Feerick, Eatman, Gardner & Kincheloe by Mel J. Garofalo for defendant appellees.*

CLARK, Judge.

[1] Plaintiff contends that her attorney's letter of 20 January 1978 constituted the filing of a claim and compliance with G.S. 97-24 sufficient to vest jurisdiction of the 1976 accident in the Commission. G.S. 97-24(a) provides:

"The right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident."

There are instances where an informal letter may serve as the filing of a claim for compensation. *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E. 2d 627 (1976). One such instance occurred in the case of *Cross v. Fieldcrest Mills*, 19 N.C. App. 29, 198 S.E. 2d 110 (1973). The letter in that case specifically requested a hearing before the Commission on the alleged injury. We held this to be "minimal compliance" with G.S. 97-24. We cannot reach the same conclusion regarding the letter in the present case. Not only does it contain no request for a hearing, it fails to assert in any way that the plaintiff is demanding compensation or that action by the Commission is necessary to settle the question. To the contrary, the letter implies that matters with regard to plaintiff's

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**Gantt v. Edmos Corporation**

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injury were being adequately handled without the involvement of the Commission. The letter does not foreclose the possibility that a claim might be filed upon receipt of the doctor's final report, but this implication does not constitute the filing of a claim. *See; Montgomery v. Fire Department*, 265 N.C. 553, 144 S.E. 2d 586 (1965). We hold that the Commission properly declined to consider the letter of 20 January 1978 as a sufficient claim under G.S. 97-24. All other communications by plaintiff's attorney with the Commission having occurred more than two years after the accident, the Commission did not err in concluding that it lacked jurisdiction over the action because no claim had been filed within two years after the accident.

[2] Plaintiff also assigns error to the Commission's holding that defendants were not estopped to plead G.S. 97-24 as a defense to plaintiff's claim. The record before us discloses no evidence of estoppel. There is evidence that defendants paid plaintiff's medical bills and conducted settlement negotiations before and after the expiration of the two-year time limit for filing claims, but there is no evidence that defendants lulled plaintiff into believing a claim need not be filed or that defendants expressly or impliedly agreed not to plead G.S. 97-24 in bar of any claim filed after the expiration of the time fixed therein. In the absence of such evidence, there is no estoppel. *Jacobs v. Manufacturing Co.*, 229 N.C. 660, 50 S.E. 2d 738 (1948).

The order of the Commission is

Affirmed.

Judges WHICHARD and BECTON concur.

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**In re Odom**

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IN THE MATTER OF: THE APPEAL OF F. L. ODOM, JR. FROM THE FINAL  
DECISION OF THE PROPERTY TAX COMMISSION, CONCERNING  
VALUATION OF HIS RETAIL STORE, 239 E. MAIN ST., AHOSKIE, N. C.

No. 8110PTC599

(Filed 16 March 1982)

**Taxation § 25.4— ad valorem taxes—appraisal of property—cost approach**

The evidence and findings supported the Property Tax Commission's determination that an appraisal of petitioner's store building for ad valorem tax purposes by a County Board of Equalization and Review, although based on a cost rather than income approach, was supported by a market appraisal and was not arbitrary.

APPEAL by petitioner from Final Decision of the North Carolina Property Tax Commission entered 26 February 1981. Heard in the Court of Appeals 5 February 1982.

Pursuant to G.S. 105-286(a)(1), real property in Hertford County was reappraised for tax purposes by the Hertford County Board of Equalization and Review for 1979. Petitioner owns a one-story brick and block store building located on Main Street in Ahoskie and constructed in 1920. The property was initially appraised at \$24,790, but its value was reduced to \$21,000 by the County Board. Petitioner appealed this appraisal to the Property Tax Commission sitting as the State Board of Equalization and Review which upheld the County Board's valuations. Pursuant to G.S. 105-345, petitioner appeals that decision.

*F. L. Odom, Jr., pro se, petitioner appellant.*

*Revelle, Burleson, Lee & Revelle by L. Frank Burleson, Jr.,  
for respondent appellee, Hertford County.*

CLARK, Judge.

In reviewing decisions of the North Carolina Property Tax Commission, a state administrative agency, we must determine whether the evidence presented to the Commission supported its conclusions.

The scope of appellate review is defined by G.S. 105-345.2, which provides in part as follows:



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“(b) . . . The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission’s findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. . . .”

It is a principle of law in this State that ad valorem tax assessments are presumed correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975); *In re Land and Mineral Co.*, 49 N.C. App. 605, 272 S.E. 2d 878 (1980), *disc. rev. denied*, 302 N.C. 397, 279 S.E. 2d 351 (1981). This presumption places the burden upon the taxpayer to prove that the assessments are incorrect. In order to overcome this presumption, the taxpayer “must produce ‘competent, material and substantial’ evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.” *In re Appeal of Amp, Inc.*, *supra*, at 563, 215 S.E. 2d at 762.

Since petitioner does not allege that the County Board used an illegal method of valuation, he has the burden of proving that the method used was arbitrary and that the assessment was substantially excessive. Petitioner’s main argument in his brief is

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that the Board erred in not using the income approach to value. It is well-established that the ability of the property to produce income is one element to be considered in determining the value of that property. *In re Valuation*, 282 N.C. 71, 191 S.E. 2d 692 (1972). Other factors to be considered are the building's location, type of construction, age, replacement cost, cost, adaptability for other uses and past income. G.S. 105-317(a)(2).

The Commission found as a fact that petitioner relied entirely on the income approach to arrive at his estimated value of \$10,000. The County Board used the cost approach in its calculations, but its valuation was also supported by the market appraisal based on a comparison of the subject property with four commercial buildings. The Board relied most heavily on a sale that occurred in October 1979 of a building one and one-half blocks from the subject property. The building is occupied by a clothing store and is highly comparable to the subject property in size, age and condition of the building, including the lack of central heat and air conditioning. The sales price of the building was \$23,000.

Based upon its findings of fact, the Commission determined that the County's appraisal of the subject property was not excessive. However, the Commission was critical of the appraisal methods used by both petitioner and the County Board stating:

"Although we generally believe that the income approach is the most reliable approach for appraising income-producing property, it is our opinion that both income appraisals in this case are seriously flawed. In the first place, there is no evidence to show that the rent being received is economic rent. Neither party had any idea of what comparable buildings in the area were renting for. Secondly, Mr. Odom's treatment of certain expenses are [*sic*] not in accordance with accepted appraisal principles. This is especially true of the treatment of property taxes. When appraising property for property tax purposes, it is improper to deduct tax expense on the basis of the County's appraisal because if the taxpayer's appraisal is accepted the tax expense will have been overstated. For example, Mr. Odom deducted tax expense of \$439. If his estimate of value had prevailed, however, the tax would have been only about \$200 based on

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his indicated rate of \$2.09 per hundred. Using the County's rate of \$1.47, the tax expense would have been only about \$150. It is therefore the generally accepted practice to include the tax rate as a factor in the capitalization rate when appraising property for property tax purposes. Except for the deduction for insurance, none of the expenses was handled in the manner usually found in a professional income approach appraisal. Past expenses would not be deducted. Instead, reserves should be set up for future expenses. In capitalizing the net income, also, the income attributable to the land should be separated from the building because land is not a wasting asset and should not be recovered."

The Commission concluded that the County Board's appraisal, although based on the cost approach, was sufficiently supported by the market appraisal. It therefore sustained the County's appraisal of \$21,000, since petitioner's evidence of his income appraisal, as noted above, was "seriously deficient in a number of important respects."

After reviewing the record as a whole, we find that petitioner has failed to carry his burden of proof in that he has not produced "competent, material and substantial" evidence tending to show the County Board's evaluation method was an arbitrary one. We hold that the findings by the Commission are supported by the evidence and that the findings in turn support the Commission's conclusion as to the valuation of the subject property. Therefore, the determination by the Commission is conclusive, since this Court is not authorized to make findings different from those of the Commission. *In re Valuation, supra.*

The decision of the Property Tax Commission is

Affirmed.

Judges ARNOLD and WHICHARD concur.

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**Arrington v. Brad Ragan, Inc.**

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CHARLES N. ARRINGTON AND WIFE, BERTIE ARRINGTON, PLAINTIFFS v.  
BRAD RAGAN, INC., T/D/B/A CAROLINA TIRE COMPANY, DEFENDANT AND  
THIRD PARTY PLAINTIFF v. LEAR SIEGLER, INC., THIRD PARTY DEFENDANT

No. 8129SC337

(Filed 16 March 1982)

**1. Uniform Commercial Code § 14— implied warranty on oil heater—directed verdict improper**

In an action which grew out of an explosion of a heater purchased by plaintiffs from defendant, the trial court erred in entering a directed verdict for defendants where plaintiffs' evidence indicated the heater malfunctioned when set on medium or low; that defendant had been notified of this shortly after purchase; and that plaintiffs set the heater on pilot, left it, and that the heater exploded.

**2. Negligence § 29— failure to properly repair heater—sufficiency of evidence**

In an action which grew out of an explosion of a heater purchased by plaintiffs from defendant, the trial court erred in directing a verdict for defendant where plaintiffs' evidence tended to show the heater malfunctioned shortly after it was installed and continued to malfunction after being repaired once by defendant; the defendant was subsequently notified on several occasions that the heater was malfunctioning; and the defendant did not send anyone to repair the heater. If the jury should believe this evidence, they could conclude that the defendant failed to do something a reasonable man would have done.

APPEAL by plaintiffs from *Gaines, Judge*. Judgment entered 4 November 1980 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 11 November 1981.

This action grew out of an explosion of a heater purchased by the plaintiffs from Brad Ragan, Inc. The original defendant joined the third party defendant for contribution. Plaintiffs' evidence showed that they purchased in October 1977 a Siegler oil heater from the original defendant, that when first installed it made a "tremendous racket" when it was operated, that an employee of the original defendant repaired the stove so that it no longer made the noise but it still did not work properly, and the plaintiff complained on several occasions to the original defendant about the malfunctioning of the heater. The plaintiffs' evidence showed further that when the heater was set on a low or medium setting there was a strong odor of fuel oil; that the heat became too intense to be borne within a period of 20 to 30 minutes; and that the heater would make what Mr. Arrington described as a "woof

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woof noise.” Mr. Arrington testified that while the heater was set on pilot, they experienced no difficulty with it. On 27 May 1978 the plaintiffs left home with the heater on pilot. They were notified at approximately 4:00 a.m. on 28 May 1978 that their home had been destroyed by fire. Mr. Arrington testified on cross-examination that they had previously left home for 24-hour periods with the heater on pilot.

Steve Bryson testified for the plaintiffs that he was in his yard approximately 100 to 150 yards from the Arrington home on 27 May 1978 when he heard a muffled explosion at the Arrington home and saw the Arringtons’ home “literally lit up in flames.” Douglas Leon Fisher testified that he is the Assistant Chief of the Toxaway Fire Department and that when he arrived at the Arrington home, the entire building was burning. He was able to determine that it was the heater that was burning “so violently.”

At the end of the plaintiffs’ evidence, the court directed a verdict for the defendants. The plaintiffs appealed.

*Potts and Welch, by Jack H. Potts and Paul B. Welch, III, for plaintiff appellants.*

*Roberts, Cogburn and Williams, by James W. Williams, for original defendant appellee.*

WEBB, Judge.

[1] If, on the evidence, the plaintiff could recover either for breach of warranty or negligence, the motion for dismissal was improperly allowed. There was an implied warranty by the original defendant that the stove would heat the plaintiffs’ home without exploding. See G.S. 25-2-315. We believe the principles applying to the facts of this case are found in *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780 (1960); *Lemon v. Lumber Co.*, 251 N.C. 675, 111 S.E. 2d 868 (1960); *Driver v. Snow*, 245 N.C. 223, 95 S.E. 2d 519 (1956). If the damage to the plaintiffs’ property was proximately caused by the explosion of the stove and the stove exploded as a result of a defect which was latent so that the plaintiffs did not know and by reasonable diligence would not have known about it, the original defendant is liable to the plaintiffs for breach of warranty. We believe the evidence that the stove had previously malfunctioned with the evidence that

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**Arrington v. Brad Ragan, Inc.**

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the fire was started by an explosion and the assistant fire chief's testimony that it was the heater that was burning "so violently" was evidence from which the jury could conclude that the explosion of the stove was a proximate cause of the destruction of the plaintiffs' home.

The defendants, relying on *Insurance Co. v. Chevrolet Co.*, *supra*, contend that the plaintiffs are barred because if there was a defect in the stove it was apparent to the plaintiffs. In *Chevrolet Co.* our Supreme Court held the plaintiff could not recover either for breach of warranty or for negligence after an automobile had allegedly burned as a result of defects in the wiring and ignition system. In that case the plaintiff alleged the owner of the automobile had continued to drive it after she discovered the ignition system was defective and the engine of the automobile was saturated with gasoline whenever she drove it. The Supreme Court held a demurrer was properly sustained. The Supreme Court said the owner of the automobile was negligent in continuing to drive the automobile when she knew of the defects and this negligence was a bar to recovery for either breach of warranty or for negligence on the part of the defendant automobile dealer in not repairing the automobile. We believe *Chevrolet Co.* is distinguishable from the instant case. In *Chevrolet Co.* the plaintiff alleged the owner of the automobile knew the ignition was faulty and the engine was saturated with gasoline while the automobile was being operated but continued to use the vehicle. In the instant case the evidence showed the plaintiffs knew the heater malfunctioned when set on medium or low, but did not know it malfunctioned on pilot. They had previously set the heater on pilot and left it for as much as 24 hours without difficulty. We do not believe the jury could only conclude from this that the plaintiffs knew, or by reasonable diligence should have known, the heater would malfunction when set on pilot. We hold it was error to grant the defendants' motion for summary judgment on the ground of a breach of implied warranty.

[2] As to the question of negligence on the part of the original defendant, we believe the evidence shows the heater malfunctioned shortly after it was installed and continued to malfunction after being repaired once by the original defendant. The original defendant was subsequently notified on several occasions that the

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Newsome v. Smith

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heater was malfunctioning but did not send anyone to repair the heater. If the jury should believe this evidence, they could conclude the original defendant failed to do something a reasonable man would have done. This would be negligence. We believe it is a jury question as to whether the plaintiffs were contributorily negligent in leaving their home with the heater on pilot when they knew the heater would malfunction when set on low or medium. The plaintiffs also contend that *res ipsa loquitur* applies. We hold that the original defendant did not retain control of the heater which makes *res ipsa loquitur* inapplicable. See *O'Quinn v. Southard*, 269 N.C. 385, 152 S.E. 2d 538 (1967).

The plaintiffs also assign error to the court's sustaining objections to questions asked of Mr. Arrington and Mr. Bryson. The record does not show what the answers of these witnesses would have been and we do not pass on these assignments of error. See *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968).

For the reasons set out in this opinion, we reverse the judgment of the superior court and remand for trial.

Reversed and remanded.

Judges MARTIN (Robert M.) and WELLS concur.

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LARRY NEWSOME, EFFIE MAE NEWSOME TURNER AND HUSBAND,  
WILLIAM TURNER, AND ODELL NEWSOME v. CLEVELAND SMITH

No. 816DC722

(Filed 16 March 1982)

**Easements § 6.1; Adverse Possession § 25.1—prescriptive easement—rebuttal of presumption of permissive use—sufficiency of evidence**

In an action to establish a prescriptive easement in a roadway across defendant's land, plaintiffs' evidence was sufficient to rebut the presumption of permissive use and to be submitted to the jury where it tended to show that the roadway had been in existence for more than sixty years and had remained in the same location; the roadway was the only means of access to plaintiffs' property and had been used by plaintiffs, members of their families and the public for at least sixty years to reach plaintiffs' land for social and agricultural purposes; neither plaintiffs nor members of the public had ever asked permission of the defendant or his predecessors in title to use the road-

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**Newsome v. Smith**

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way and none had been given; plaintiffs and their predecessors in title had maintained the road by smoothing, upgrading and graveling it; and plaintiffs believed that they owned the roadway.

APPEAL by plaintiffs from *Long, Judge*. Judgment entered 10 February 1981 in District Court, NORTHAMPTON County. Heard in the Court of Appeals 11 March 1982.

This case arose out of the use by plaintiffs of a pathway over defendant's property to get to and from plaintiffs' land. Plaintiffs brought this action to establish an easement by prescription over the pathway and to enjoin defendant from interfering with plaintiffs' use of the path.

At trial plaintiffs' evidence tended to show that the path had been in existence for more than sixty years and had remained in the same location. The path was the only means of access to plaintiffs' property and had been used by plaintiffs, members of their families and the public for at least sixty years to reach plaintiffs' land for social and agricultural purposes. Plaintiffs' evidence tended to show that neither plaintiff nor members of the public had ever asked permission of the defendant or his predecessors in title to use the road and none had been given. Plaintiffs and their predecessors in title had maintained the road by smoothing, upgrading and gravelling it.

Defendant presented no evidence and moved for a directed verdict, which was granted. From this judgment, plaintiffs appealed.

*Thomas L. Jones, for the plaintiff-appellants.*

*No brief filed for the defendant-appellee.*

MARTIN (Robert M.), Judge.

The sole issue on appeal is whether the trial court properly granted defendant's motion for a directed verdict. Defendant is entitled to a directed verdict only if the evidence, when considered in the light most favorable to plaintiffs, fails to show the existence of each and every element required to establish an easement by prescription. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Plaintiffs are entitled to the benefit of every reasonable inference



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which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in their favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978).

In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence:

(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period. E.g., *Dickinson v. Pake*, 284 N.C. at 580-81, 201 S.E. 2d at 900-01.

*Potts v. Burnette*, 301 N.C. at 666, 273 S.E. 2d 287-88.

This case on its facts is very similar to *Dickinson v. Pake*, supra. In *Dickinson*, plaintiffs brought an action to establish a prescriptive easement in a roadway over defendant's land which had been used by themselves and the public to reach plaintiffs' property for over twenty years. The disputed roadway provided the sole means of ingress and egress to plaintiffs' land. Plaintiffs had themselves performed the slight maintenance necessary to keep the road passable. Permission to use the road had neither been sought nor given, and plaintiffs testified that, prior to the blocking of the road by defendant, they considered the road to be their own. The court in *Dickinson* held that this evidence when considered in the light most favorable to plaintiffs was sufficient to withstand defendant's motions for directed verdict and for judgment notwithstanding the verdict. The plaintiffs were entitled to have the issue submitted to the jury.

Another case on point is *Potts v. Burnette*, supra. In *Potts*, plaintiffs' evidence tended to show that the road in question had been in existence for substantially more than fifty years and had remained essentially in the same location. The road was the only means of access for vehicular traffic to plaintiffs' property. Plaintiffs, members of their families and the public had used the road for at least fifty years to reach plaintiffs' land for social and agricultural purposes. Neither plaintiffs, nor members of the public had ever requested permission of defendant or his

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predecessors in title to use the road and none had been given. Plaintiffs had maintained the road by smoothing, grading and gravelling it on at least one occasion. Defendant presented no evidence, but moved for a directed verdict, which was denied. Defendant appealed and the Court of Appeals reversed, finding that plaintiffs' evidence was insufficient to go to the jury on the issue of hostility and held that defendant was entitled to a directed verdict or a judgment notwithstanding the verdict. Plaintiffs thereupon petitioned for discretionary review of the Court of Appeals' decision, which was granted. Our Supreme Court reversed the decision of the Court of Appeals and held that plaintiffs' evidence established the existence of every essential element of their claim for a prescriptive easement.

The *Dickinson* and *Potts* cases control the resolution of this appeal. Plaintiffs' evidence, viewed in the light most favorable to plaintiffs, tended to show that the disputed roadway was the only means of access to plaintiffs' land and home and has been openly and continuously used by plaintiffs and their predecessors in title for at least sixty years. No permission has ever been asked or given. Plaintiffs have maintained the road and some evidence indicates that plaintiffs believed they owned the road. This evidence, pursuant to the *Dickinson*, *supra*, and *Potts*, *supra*, cases, is sufficient to rebut the presumption of permissive use and to allow, but not compel, a jury to conclude that the road was used under such circumstances as to give the defendant notice that the use was adverse, hostile and under claim of right; that the use was open and notorious, with defendant's full knowledge and acquiescence; and that the plaintiffs and their predecessors in title had used the road continuously and uninterruptedly for a period of approximately sixty years.

Consequently plaintiffs' evidence was sufficient to carry this case to the jury. The trial court erred in granting defendant's motion for a directed verdict.

Reversed.

Judges MARTIN (Harry C.) and WHICHARD concur.

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**Force v. Sanderson**

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FRANK H. FORCE AND WIFE, LORRAINE FORCE v. MARGARET TRIGG SANDERSON, EXECUTRIX OF THE ESTATE OF CARL H. DAWSON, DECEASED

No. 8115SC639

(Filed 16 March 1982)

**Executors and Administrators § 18; Insurance § 105— automobile accident—claim against decedent's insurer—not barred by statute of limitations concerning claims against estate**

In an action in which plaintiffs alleged that they were injured and damaged as a result of the negligent operation of an automobile owned and operated by decedent's testator on 9 April 1977, the trial court erred in granting defendant's motion for summary judgment on the basis that no written claim was filed by plaintiffs against decedent's estate within six months of the date of the first publication of defendant's notice to creditors or within six months after the date the claim arose as provided in G.S. 28A-19-3. Defendant would not be prejudiced in any way by allowing plaintiffs to seek recovery within the limits of coverage of decedent's automobile liability insurance policy.

APPEAL by plaintiffs from *McLelland, Judge*. Judgment entered 6 April 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 11 February 1982.

On 9 April 1980, plaintiffs brought an action for personal injuries and property damages. In their complaint, plaintiffs alleged that they were injured and damaged as a result of the negligent operation of an automobile owned and operated by defendant's testator, Carl H. Dawson. The collision occurred on 9 April 1977. Plaintiffs also alleged that at the time of the collision, Dawson had an automobile liability insurance policy in effect with Nationwide Insurance Company. Shortly after 9 April 1977, plaintiffs' attorneys began negotiating with Nationwide's representatives in an effort to settle their claims against Dawson's estate. The negotiations continued through the year 1979.

Defendant answered with denials as to Dawson's negligence but admitted his ownership and operation of his automobile on the occasion of the collision and admitted the alleged insurance coverage. As an additional defense, defendant alleged that Dawson died on the date of the collision, 9 April 1977; she was appointed executrix of Dawson's estate on 18 April 1977; she administered the estate until she filed her final account on 15 June 1978; no claims were filed by plaintiffs against Dawson's estate

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**Force v. Sanderson**

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within 6 months of the date such claim arose; and by reason of plaintiffs' failure to timely file their claims against Dawson's estate, such claims were barred. Defendant also asserted the three year statute of limitations as a bar to plaintiffs' claims.

After the pleadings were joined, defendant moved for summary judgment. In support of her motion, defendant filed an affidavit in which she alleged that she was duly appointed as the executrix of Dawson's estate by issuance of letters testamentary on 2 May 1977; notice to creditors was published for four weeks beginning 10 November 1977; Dawson died 9 April 1977, either before or immediately at the time of the collision; and no written claim was filed by plaintiffs against Dawson's estate prior to the institution of this accident on 9 April 1980.

In opposition to defendant's affidavit, plaintiffs filed the affidavit of their attorney, C. Banks Finger, who stated that on 10 May 1977 he notified Nationwide that he was making claim on plaintiff's behalf against Nationwide as the insurance carrier for Dawson's estate; that Finger negotiated from 10 May 1977 to March 1980; and that on several occasions, Nationwide tendered an offer of settlement.

The trial court granted defendant's motion for summary judgment and dismissed plaintiffs' action. Plaintiffs appeal from that judgment.

*Finger, Park and Parker, by Raymond A. Parker, II, for plaintiff-appellants.*

*Bryant, Drew, Crill & Patterson, by Victor S. Bryant, Jr., and Lee Patterson, for defendant-appellee.*

WELLS, Judge.

Although there may be a factual issue in this case as to whether defendant's testator died before or during the collision of his automobile, that issue is not determinative of this appeal. Plaintiffs contend their action is not barred by reason of their failure to file their claims against Dawson's estate within six months of the date of the first publication of defendant's notice to creditors, or, within six months after the date the claim arose. The applicable statute is G.S. 28A-19-3, as that statute was worded in 1977, as follows:

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**Force v. Sanderson**

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§ 28A-19-3. Limitations on presentation of claims.—(a) All claims, except contingent claims based on any warranty made in connection with the conveyance of real estate, against a decedent's estate which arose before the death of the decedent, including claims of the United States and the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 within six months after the day of the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the United States and the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector as follows:

. . .

(2) Any claim other than a claim based on a contract with the personal representative or collector, within six months after the claim arises.

The opinion of our Supreme Court in *In re Miles*, 262 N.C. 647, 138 S.E. 2d 487 (1964), is controlling here. The facts in *Miles*, supra, were as follows. Plaintiff Petitioner Grubb, administrator of the estate of Ronald Allen Sybrant, had a claim against the estate of Wilson Miles for an alleged wrongful death sustained in an automobile collision which occurred on 10 January 1962. On 2 February 1962, Eugenia Miles was appointed administratrix c.t.a. of the estate of Wilson Miles. On 11 February 1963, an order was entered by the Clerk approving the final account of Eugenia Miles and directing her discharge. An automobile liability insurance

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**Force v. Sanderson**

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policy was an asset of Miles' estate which may have been available for payment of Grubb's claim for the wrongful death of Sybrant. On 9 January 1964, Grubb instituted a civil action to recover damages for the wrongful death of Sybrant. On 6 March 1964, Grubb filed a petition before the Clerk to re-open Miles' estate. The trial court ordered that Miles' estate be re-opened. In affirming the trial court, the Supreme Court, referring to G.S. 28-113, the predecessor to G.S. 28A-19-3, held:

By the provisions of G.S. 28-113, if a claim is not presented in six months, the representative is discharged as to assets paid. Even if this statute applies to a claim for unliquidated damages, which we do not concede, it would only bar petitioner's claim for damages for wrongful death as to assets paid out by appellant, and he could still assert his demand against undistributed assets of the estate and without cost against the administratrix c.t.a. of the Miles estate. *In re Estate of Bost*, 211 N.C. 440, 190 S.E. 756. In our opinion, failure of petitioner to file a claim for unliquidated damages with appellant does not bar his action, where he is seeking to recover damages for an alleged wrongful death of his intestate, and to collect it out of the automobile liability insurance policy issued to Miles, deceased.

*See also Carethers v. Blair*, 53 N.C. App. 233, 280 S.E. 2d 467 (1981).

Defendant relies on the decision of our Supreme Court in *Anderson v. Gooding*, 300 N.C. 170, 265 S.E. 2d 201 (1980) in support of her argument that plaintiffs' claims are barred under G.S. 28A-19-3. We do not agree. In *Anderson*, the court did not reach the question we have addressed here.

We are persuaded that as the personal representative of Dawson's estate, defendant will not be prejudiced in any way by allowing plaintiffs to seek recovery within the limits of coverage of Dawson's automobile liability insurance policy. At trial, plaintiffs' damages will be limited to the coverage provided in Dawson's liability insurance policy which was in force at the time of the collision.

The judgment below dismissing plaintiffs' action is

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**Williams v. Riley**

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Reversed.

Judges MARTIN (Robert M.) and WEBB concur.

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GARY LEE WILLIAMS v. JAMES L. RILEY, SR., AND WIFE, ETHA ELLEN RILEY

No. 8120SC634

(Filed 16 March 1982)

**1. Courts § 21.5— accident in South Carolina—negligence—breach of implied warranty—which law applies**

Plaintiff's action to recover damages for injuries sustained when he fell through the railing of the second floor deck of a beach cottage rented from defendants in South Carolina on the basis of alleged negligence by defendants in failing to inspect, repair and maintain the premises in a reasonably safe condition and on the basis of breach of implied warranty was governed by the law of South Carolina.

**2. Landlord and Tenant § 8.1— creation of landlord-tenant relationship—no duty of landlord to repair**

Under the law of South Carolina, a landlord-tenant relationship rather than an innkeeper-guest relationship was created when plaintiff and four of his friends leased the second floor portion of defendants' beach cottage, and the landlord had no duty to the tenants to keep the premises in repair in the absence of an express warranty.

APPEAL by plaintiff from *DeRamus, Judge*. Order entered 31 March 1981 in Superior Court, MOORE County. Heard in the Court of Appeals 11 February 1982.

Plaintiff brought this personal injury action against defendant, the owner and lessor of a beach cottage in Cherry Grove, South Carolina, where plaintiff and his friends were vacationing, and where plaintiff's injury occurred. After reviewing the pleadings, depositions and testimony, Judge DeRamus granted defendants' motion for summary judgment. Plaintiff appeals.

The facts of this case are largely undisputed. All the parties are North Carolina citizens. Plaintiff's evidence tends to show the following. Plaintiff's friend, Mark Turner, contracted with defendants' South Carolina rental agent, Hank Thomas, to rent defendants' oceanfront duplex in Cherry Grove, South Carolina. Turner

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Williams v. Riley

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and four other young men paid \$125.00 to rent the second-floor duplex for one week. Plaintiff arrived at the duplex in the early morning hours of 11 June 1977. On the afternoon of 11 June, plaintiff and two sizable male friends were leaning against the wooden railing which surrounded the outside, second floor deck. The total weight of the three men was about 540 pounds. Plaintiff testified that there were chairs on the deck, and that "[y]ou could tell from the construction of the railing that they (sic) were not seats." Plaintiff heard a cracking noise, the railing gave way, and he fell, injuring himself.

Defendants' evidence tends to show that the cottage is fairly old but has been well maintained. The deck railing was last replaced in 1975. Defendant testified that the only purpose of the railing was to prevent people from walking off the deck; deck chairs were provided for seating. Without objection by plaintiff, defendant testified that Mark Turner said he saw plaintiff and his friends engaged in horseplay on the deck and when one man moved to push another off, the railing pulled off, and they fell. Hank Thomas, who arrived at the scene of the accident immediately after it occurred, observed that the railing was neither rotten nor broken; instead, its nails had simply pulled away from its supporting posts.

*Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff-appellant.*

*Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for defendant-appellees.*

WELLS, Judge.

The ultimate question on this appeal is whether summary judgment for defendant was properly granted.

[1] In his verified complaint, plaintiff first alleged that defendants were negligent in failing to inspect, repair and maintain the premises in a reasonably safe condition; that defendants knew or should have known of the dangerous railing, and that defendants should have warned plaintiff of it. This aspect of plaintiff's cause of action is clearly founded in tort. Both North Carolina and South Carolina follow the traditional rule of *lex loci delicti*, "[t]he law of the state in which the tort occurs governs the case." *Mat-*



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*thews, Cremins, McLean, Inc. v. Nichter*, 42 N.C. App. 184, 256 S.E. 2d 261 (1979), *disc. rev. denied*, 298 N.C. 569, 261 S.E. 2d 123 (1979); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E. 2d 303 (1964); *see* Annot., 29 A.L.R. 3d 603; Annot., 77 A.L.R. 2d 1266. The place of the tort is in the state where the last event invoking tort liability occurred. Restatement 2d, Conflict of Laws, § 377. Since plaintiff's injury occurred in South Carolina, the law of that state controls the substantive legal aspects of this case. North Carolina being the forum state, North Carolina law controls the procedural aspects of the case, and is dispositive on whether an issue is substantive or procedural. Annot., 29 A.L.R. 3d 603, § 1(a), n.1.

Plaintiff's complaint also alleges, in the alternative, that "[d]efendants breached an implied warranty of fitness by providing to the plaintiff use of a cottage unfit for its normal intended use." Again, South Carolina law controls, as the lease was entered into and performed in that state. *See* 16 Am. Jur. 2d, Conflict of Laws, § 80.

[2] The next issue to be addressed concerns the relationship between the parties. Plaintiff argues that this was not a landlord-tenant relationship, but one of an innkeeper-guest. Plaintiff bases his argument on rental agent Thomas' admission that he had access to the cottage at all times, although when occupants were there, Thomas apparently only entered to make a repair at a renter's request, to deliver a message, or to investigate complaints. Thomas never entered the cottage during plaintiff's stay there. The written rental agreement, if any, negotiated by Thomas and Turner is not part of the record.

Under South Carolina's statutory definitions of "hotel" and "innkeeper," however, plaintiff's argument must fail. The following pertinent sections of S.C. Code, Title 45: Hotels, Motels, Restaurants and Boardinghouses, provides:

§ 45-1-40. Innkeeper's liability for loss of baggage, money, jewels, and other personal property. "Innkeeper" as used in this section shall mean the proprietor of any hotel, inn, boardinghouse, motor court, or motel where beds or lodging are for hire.

§ 45-5-10. Definitions.

A "hotel" as used in this chapter [Safety Regulations] is an inn or public lodginghouse of more than ten bedrooms

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where transient guests are fed or lodged for pay in this state.

§ 45-5-20. Applicability to private residences. Nothing in this chapter shall apply to private residences at which lodgers are not received for hire.

Defendant's upstairs duplex has three bedrooms, and thus does not qualify as a hotel. Neither is it an "inn," since the entire duplex was rented out, rather than bedspace or rooms. We find that plaintiff and his friends leased defendants' cottage, establishing a landlord-tenant relationship between himself and the Rileys.

In South Carolina, absent express warranty, a landlord owes no duty of care to a tenant to keep the premises in repair. *Sheppard v. Nienow*, 254 S.C. 44, 173 S.E. 2d 343 (1970); *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 132 S.E. 2d 385 (1963); *Pendarvis v. Wannamaker*, 173 S.C. 299, 175 S.E. 531 (1934); *Timmons v. Williams Wood Products Corp.*, 164 S.C. 361, 162 S.E. 329 (1931); see also *Hatfield v. Palles*, 537 F. 2d 1245 (1976) (applying S.C. law). Even where a breach of an express agreement to repair is shown, such a breach will not support the recovery of damages for personal injury sustained by reason of the defective condition of the premises. *Sheppard v. Nienow*, supra.

Although we have frequently iterated the rule that summary judgment is rarely appropriate in negligence cases, *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980), where the forecast of evidence discloses a fatal weakness in plaintiff's claim that would bar his right of action under any circumstances, summary judgment is appropriate. *Vassey*, supra, *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). Since this case raised only issues of law which supported an entry of summary judgment for defendant, this case must be and is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

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**Cothran v. Evans**

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JAMES W. COTHRAN, H. LAWTON COTHRAN AND RISDEN A. LYON v.  
TILDON EVANS

No. 8120SC574

(Filed 16 March 1982)

**Agriculture § 12— lease of tobacco allotment valid**

Where plaintiffs signed a Record of Transfer of Allotment, pursuant to the Rules of the Agriculture Adjustment Act of 1938, they agreed to be bound by its terms and thereby to subordinate their lien on their farm to the lease of defendant. Although their farms were foreclosed in 1979, the sale did not extinguish defendant's lease of the allotments, and plaintiffs, as the present record owners of the farms, are not entitled to exercise the farms' tobacco allotment until the expiration of the lease in 1982.

APPEAL by plaintiffs from *DeRamus, Judge*. Judgment entered 2 April 1981 in Superior Court, MOORE County. Heard in the Court of Appeals 3 February 1982.

Plaintiffs appeal from an order of summary judgment in favor of defendant.

The following evidence is undisputed. In 1975, plaintiffs conveyed two farms in Moore County to Whispering Pines, Inc., which returned to plaintiffs a purchase money note and a deed of trust. The deed of trust was recorded.

In December 1977, Whispering Pines, Inc., and defendant entered into a five-year lease of the flue-cured tobacco allotment on the two farms: number 07188 for 1.07 acres and 1,555 lbs., and number 07182 for 4.58 acres and 8,010 lbs. The lease with option to purchase provided:

"If for any reason Lessor [Whispering Pines, Inc.] should lose the title to the property where the tobacco allotment is located or for any reason be unable to legally lease the tobacco allotment for any period during the term of this lease, Lessor shall promptly repay Lessee [Tildon Evans] on a pro rata basis for any unexpired term of said lease."

Defendant duly recorded the lease.

In April of 1978, Whispering Pines, Inc. was delinquent in its note payments to plaintiffs. It asked plaintiffs to agree to a lease of the farms' tobacco allotment to defendant. Upon investigation,

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plaintiffs' attorney discovered the already recorded lease. Plaintiffs decided to agree to the transfer, understanding that the rental payments would be applied to the delinquent interest owed them by Whispering Pines, Inc. Acting through their attorney-in-fact, they signed a Record of Transfer of Allotment required by the Agricultural Stabilization and Conservation Service. The form provided that plaintiffs, as signing mortgagees, agreed to a five-year lease between Whispering Pines, Inc. and defendant of 4.58 acres with a marketing quota of 8,010 lbs. The lease was to expire in 1982.

In 1979, the deed of trust on the two farms was foreclosed. Plaintiffs were the successful bidders and are now record owners of the farms. They requested defendant to vacate the land after the harvest of his 1979 crops. Defendant has refused to do so.

Plaintiffs initiated this action to obtain a money judgment for the value of the tobacco allotment for 1980 and an injunction ordering defendant to transfer the tobacco allotment back to plaintiffs. Defendant moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. On the basis of evidence presented in the pleadings and affidavits, the court granted defendant's motion.

*Johnson, Patterson, Dilthey and Clay, by Richard T. Boyette, and Page, Neville and Dedmond, by Richard E. Dedmond, for plaintiff appellants.*

*J. Gates Harris, for defendant appellee.*

VAUGHN, Judge.

Plaintiffs argue that the court erred in granting summary judgment in favor of defendant. We disagree.

Summary judgment is properly granted only if all the evidence before the court indicates that there is no genuine issue as to any material fact and that one party is entitled to judgment as a matter of law. *Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981). In the present cause, the material facts concern the lease between Whispering Pines, Inc. and defendant, the Record of Transfer of Allotments, and plaintiffs' present posi-

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tion as title owners of the land. There is no disagreement between the parties as to these facts.

Plaintiffs contend there is an issue of fact concerning their intent in signing the Record of Transfer form. Plaintiffs' complaint, however, does not allege misrepresentation or mistake. We conclude that there is no genuine issue as to any material fact.

We next decide whether defendant proved he was entitled to judgment as a matter of law. Plaintiffs contend that the lease is subject to the general rules regarding priority of deeds of trust over subsequent conveyances. Since the lease was recorded subsequently to plaintiffs' recorded mortgage and deed of trust, plaintiffs argue it was a junior lien extinguished by the sale on foreclosure.

Tobacco allotments, however, are not within the purview of North Carolina's registration statutes concerning prior encumbrances. *Hart v. Hassell*, 250 F. Supp. 893 (E.D.N.C. 1966). Transfers of the acreage allotments are governed by Part I, Section B, Subchapter II, of the Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1311-1316. 7 U.S.C. § 1313(d) (1976) explicitly states that "[f]arm marketing quotas may be transferred only in such manner and subject to such conditions as the Secretary [of Agriculture] may prescribe by regulations." The statute is a valid exercise of Congress' commerce powers. Whenever state and federal regulations seek to control the same subject matter, the Congressional regulations are dominant. *Currin v. Wallace*, 306 U.S. 1, 11, 59 S.Ct. 379, 385, 83 L.Ed. 441, 449 (1938).

7 U.S.C. § 1314b permits the owner of a farm for which a tobacco acreage allotment is established, to lease all or part of such allotment to any other owner or operator of a farm in the same county having a current tobacco allotment of the same kind. The lease may not exceed five years and must comply with other regulations prescribed by the Secretary.

Pursuant to his authority, the Secretary has promulgated 7 C.F.R. § 725.72 (1981), a regulation concerning the transfer of acreage and farm marketing quotas of flue-cured tobacco. 7 C.F.R. § 725.72(c)(2) provides:

"No lease of any quota under this section shall become effective until a record of transfer, determined by the county com-

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mittee to be in compliance with the provisions of this section, has been executed on Form ASCS-375 and filed within the time periods prescribed in this section, with the county committee in the county where the farms are administratively located."

In the present cause, the recorded December 1977 lease between Whispering Pines, Inc. and defendant was within the five-year limitation of 7 U.S.C. § 1314b. The parties, however, did not file the required Form ASCS-375. Acreage allotments cannot be affected by bargains between individual farm owners. *McClung v. Thompson*, 401 F. 2d 253, 256 (8th Cir. 1968). We, therefore, conclude that the 1977 lease between Whispering Pines, Inc. and defendant was ineffective.

In 1978, the parties did comply with 7 C.F.R. § 725.72(c)(2). Whispering Pines, Inc. and defendant signed a Record of Transfer of Allotment of 4.58 acres with a marketing quota of 8,010 lbs. Because the transfer was a five-year lease, however, federal regulations also required the written consent of plaintiffs: "No transfer of allotment other than by annual lease shall be made from a farm subject to a mortgage or other lien unless the transfer is agreed to in writing by the lienholder." 7 C.F.R. § 725.72(o).

The consent of the farms' lienholder is necessary in order to subordinate the property lien to the contemplated transfer. Tobacco allotments do not belong to individuals, but run with the land. *McClung v. Thompson, supra*; *Williamson v. Holland*, 232 F. Supp. 479 (E.D.N.C. 1963). Signing is voluntary, however. A lienholder may choose not to consent to the transfer and thus to limit the conveyance to an annual lease.

In the present cause, plaintiff mortgagees signed the Record of Transfer. They agreed to be bound by its terms and thereby to subordinate their lien on the farm to the lease to defendant. This five-year lease became effective on 13 April 1978 when the transfer of the tobacco allotment was approved by the County Committee of Moore County. Although the farms were foreclosed in 1979, the sale did not extinguish defendant's lease. Plaintiffs, as the present record owners of the farms, are not entitled to exercise the farms' tobacco allotment until the expiration of the lease in 1982.

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State v. Carter

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Plaintiffs argue that if their signing the Record of Transfer constituted a consent to the lease, the transfer is nevertheless ineffective against them because they received no consideration for that consent. The argument is without merit. Among other things, the signed Record of Transfer recites that consideration has been received, and we need not inquire into the adequacy of that consideration. *Jewel Box Stores v. Morrow*, 272 N.C. 659, 666, 158 S.E. 2d 840, 845 (1968).

We conclude that defendant was entitled to a judgment as a matter of law.

The motion for summary judgment was properly granted.

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. ERNESTINE CARTER

No. 8112SC935

(Filed 16 March 1982)

**1. Searches and Seizures § 16— consent to search by defendant's wife**

Officers lawfully examined building materials in the backyard of defendant's home pursuant to consent given by defendant's wife who had an equal right to and common authority over the premises.

**2. Receiving Stolen Goods § 5.1— possession of stolen property—control of premises—identity of stolen goods—sufficiency of evidence**

In a prosecution for felonious possession of stolen building materials, the testimony of an officer who lived in the area where the materials were found was sufficient to permit an inference that defendant owned or controlled the premises on which the materials were found, and the testimony by the president of the company from which building materials were stolen "that the material was [his]" sufficiently identified the materials as those stolen from the company.

APPEAL by defendant from *Lee, Judge*. Judgment entered 1 April 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 February 1982.

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Defendant was indicted for felonious breaking and entering, larceny, and felonious possession of stolen property. The jury returned verdicts of (1) not guilty of felonious breaking and entering, (2) guilty of felonious larceny, and (3) guilty of felonious possession of stolen property.

The trial court allowed defendant's post-trial motion to dismiss the felonious larceny charge. It then sentenced defendant under G.S. 15A-1351 (Cum. Supp. 1981) to imprisonment of not less than three nor more than five years, ninety days to be served in the Cumberland County jail with recommendation of work release, the remainder with supervised probation. Defendant was also ordered to make restitution to the victim.

Defendant appeals.

*Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.*

*Seavy A. Carroll for defendant appellant.*

WHICHARD, Judge.

Defendant contends the court erred in denying his motion to suppress evidence and his motions to dismiss. We find no error.

MOTION TO SUPPRESS

[1] Defendant's pre-trial motion to suppress was heard and determined by Judge Anthony M. Brannon at the 3 March 1981 Criminal Session, Cumberland County Superior Court. The State's evidence on *voir dire* tended to show the following:

On 25 September 1980 building materials, consisting principally of blue tipped lumber studs, were missing from the premises of American Classic Homes in Cumberland County. Pursuant to an anonymous tip, law enforcement officers concentrated their search for the materials in the Horseshoe Loop or Bladen Circle area of Vander. From the roadway they observed "a large pile of something" in the backyard of a residence. From approximately fifty yards away they "could see two by fours with the ends dyed blue." They knew they were looking for building materials which were "supposedly behind a residence," and that "the building materials would be painted blue on both ends of the two by fours . . . ."



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One of the officers knocked on the front door of the house where the materials were observed. He told the woman who answered, whom he identified as defendant's wife, that the officers were looking for stolen building materials with painted blue ends, and that the merchandise in her backyard appeared to match that description. He requested and received her "permission to go back there and look at" the materials. Upon viewing the materials the officers found that they matched the description they had been given of the missing property. They then called the president of American Classic Homes who came and identified the property. He based his identification on the fact that the property "had some blue markings on it" and was "in quantities that [he was] missing . . . ." He also knew of no other company in the area which bought this particular product with the blue ends.

The trial court found as facts that defendant's wife had equal right to and common authority over the premises in question; that her common authority was apparent to the officer who approached the front door and indicated his purpose for being there; that the officers, after obtaining the permission of defendant's wife, examined the materials in the backyard and contacted the president of American Classic Homes, who identified the materials as his. These findings are supported by competent evidence and thus are not subject to reversal on appeal. *State v. McKeithan*, 293 N.C. 722, 728, 239 S.E. 2d 254, 258 (1977); *State v. Hawley*, 54 N.C. App. 293, 298, 283 S.E. 2d 387, 392 (1981). The findings support the court's conclusion "[t]hat there was in all respects a consent to search . . . by a person who by ownership or otherwise was reasonably apparently entitled to give consent to search . . . ." See G.S. 15A-222(3). "Where two people have equal rights to the use or occupation of premises, either person may consent to a search of the premises, and evidence found therein can be used against either." *State v. Melvin*, 32 N.C. App. 772, 774, 233 S.E. 2d 636, 638 (1977). See also *State v. Howard and Jones*, 56 N.C. App. 41, 286 S.E. 2d 853, 856 (1982); *State v. Reagan*, 35 N.C. App. 140, 240 S.E. 2d 805 (1978); *State v. McNeill*, 33 N.C. App. 317, 235 S.E. 2d 274 (1977). The record fully supports the court's determination on *voir dire* that the search was valid by reason of the consent given by defendant's wife. We thus deem it unnecessary to discuss defendant's other arguments relating to the motion to suppress. Defendant's assignment of error to the denial of the motion is overruled.

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MOTIONS TO DISMISS

[2] Defendant contends his motions to dismiss should have been allowed because (1) there was no evidence at trial that he owned or controlled the premises where the missing materials were found, and (2) the materials found were not sufficiently identified as those missing and believed stolen from American Classic Homes. In ruling on motions to dismiss "all of the evidence favorable to the State . . . must be considered, . . . must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977). The evidence here, so considered, was ample to show that defendant owned or controlled the premises, and that the materials found thereon were those missing from American Classic Homes.

The following testimony by one of the investigating officers was sufficient to permit a jury inference that defendant owned or was in control of the premises:

I have lived in the Vander area all of my life. I have lived about a mile away from this particular house where I saw this pile in the backyard. I knew who I thought was the owner of the house and that was [defendant]. As to how I knew that, I was under the impression he had built it to live in and the thing that gave me that impression was that we did some work on it. That work was insulation and that was about ten or twelve years ago. Over that ten or twelve year period, I have seen [defendant] in or about the premises, going and coming, [sic] As to how many occasions I don't know — many, many of them. I had seen his sons in or about the premises, coming and going. I knew [defendant's] first wife and I saw her in and about those premises on several occasions.

The president of American Classic Homes positively and unequivocally testified "that the material was [his]." His later testimony on cross examination that he did not "know absolutely that the material was [his]" created "discrepancies and contradictions" which were for the jury to resolve, but which the court properly disregarded in ruling on the motions to dismiss. *Id.*

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No error.

Judges CLARK and ARNOLD concur.

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STATE OF NORTH CAROLINA v. JIMMY THOMPSON

No. 8129SC1009

(Filed 16 March 1982)

**1. Criminal Law § 21— denial of motion for return of evidence after finding of no probable cause**

The trial court had authority pursuant to G.S. § 15-11.1(a) to retain money seized from defendant's premises pursuant to a valid search warrant even though the trial judge entered a finding of no probable cause at defendant's probable cause hearing. The court ordered that, if the District Attorney's office had not submitted bills of indictment against defendant to the grand jury on or before 31 July 1981, the \$4360 was to be returned to the defendant, and on 28 July 1981 an indictment was returned against defendant.

**2. Criminal Law § 146— no appeal from interlocutory order in criminal case**

Defendant's appeal from an order denying defendant's request for the return of money seized from his premises after the trial judge found no probable cause at his probable cause hearing, was interlocutory and must be dismissed. The order did not destroy, impair, or seriously imperil a substantial right of the defendant, and the action of the trial judge was explicitly authorized by G.S. § 15-11.1(a).

APPEAL by defendant from *Owens, Judge*. Judgment entered 20 July 1981 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 2 March 1981.

On 7 May 1981, Detective Sgt. John Wilkins of the Forest City Police Department received information from a confidential source that the defendant was selling cocaine for \$2000 per ounce at his place of business in Forest City. Sgt. Wilkins then placed into circulation through the confidential source \$1000 in bills marked with fluorescent dust belonging to the City of Forest City.

Later that day, Sgt. Wilkins went to the defendant's place of business with a search warrant for money, cocaine and other drug related items. At this time, other officers of the Forest City Police Department had these premises under surveillance. When

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Sgt. Wilkins entered the defendant's building, Ted Harris ran out, got in a car, and drove away. Officer Hal Greene of the Forest City Police Department pursued Harris, who threw a small plastic bag from the vehicle. This small plastic bag was found to contain approximately one ounce of the controlled substance cocaine.

Sgt. Wilkins searched the defendant's premises and person pursuant to the execution of the search warrant. The only controlled substance found on the premises was a small amount of marijuana. Sgt. Wilkins found \$4,360 in United States currency on the defendant's person. Among these monies Sgt. Wilkins found the \$1,000 in marked bills that he had placed in circulation. As a result of these events, the defendant was charged with the felonious conspiracy to possess the cocaine for purpose of sale and with the felony of possession of cocaine for purpose of sale. Ted Harris was charged with the felonies of conspiracy to possess cocaine with intent to sell and deliver and possession of cocaine.

On 3 July 1981 District Court Judge Thomas N. Hix presided over the defendant's probable cause hearing. When the State put on no evidence as to the charges against the defendant, Judge Hix entered a finding of no probable cause. The defendant's attorney then moved for the return of the \$4,360 to the defendant, which motion was denied, and the defendant appealed to Superior Court.

On 20 July 1981 a hearing was held before Superior Court Judge Hollis M. Owens on the defendant's motion for the return of the \$4,360.00. Judge Owens denied the defendant's motion upon a finding that the currency constituted evidence that the State may desire to offer in any prosecution against the defendant and/or Ted Harris. The court ordered that, if the District Attorney's office had not submitted bills of indictment against the defendant and/or Ted Harris to the grand jury on or before 31 July 1981, the \$4,360 was to be returned to the defendant.

From the Superior Court's order of 20 July 1981, the defendant appealed to this Court.

*Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney John F. Mad-drey, for the State.*

*George R. Morrow, for the defendant-appellant.*

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MARTIN (Robert M.), Judge.

The defendant's sole argument on appeal is that the trial court erred in denying his motion for the return of the \$4,360 seized by Officer Wilkins on 7 May 1981. We must disagree.

[1] In this case the money was seized from defendant pursuant to a valid search warrant. N.C. Gen. Stat. § 15-11.1(a) provides that a law enforcement officer shall safely keep property seized pursuant to lawful authority under the direction of the court for "as long as necessary to assure that the property will be produced at and may be used as evidence in *any* trial." (Emphasis added.) On 28 July 1981 an indictment was returned against defendant and the trials for defendant and Ted Harris are set for 10 March 1982 in Rutherford County. Clearly the trial court had the authority pursuant to N.C. Gen. Stat. § 15-11.1(a) to retain the money until the matter came on for trial.

[2] Moreover, the defendant's appeal is interlocutory and must be dismissed. In a criminal case there is no provision in N.C. Gen. Stat. § 7A-27 for an appeal to the Court of Appeals as a matter of right from an interlocutory order entered therein. *State v. Black*, 7 N.C. App. 324, 172 S.E. 2d 217 (1970). The order entered by Judge Owens is not a final judgment which disposes of the case between the State and the defendant, leaving nothing to be determined between them in the trial court. This order leaves the case for further action by the trial court in order to settle and determine the whole controversy between the State and the defendant. *State v. Childs*, 265 N.C. 575, 144 S.E. 2d 653 (1965). In *Privette v. Privette*, 230 N.C. 52, 53, 51 S.E. 2d 925, 926 (1949) the court said: "As a general rule an appeal will not lie until there is a final determination of the whole case. [Citations omitted.] It lies from an interlocutory order only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant." Judge Owens' interlocutory order does not put an end to this case. It does not destroy, impair, or seriously imperil a substantial right of the defendant; in fact, the action of the trial judge is explicitly authorized by N.C. Gen. Stat. § 15-11.1(a). Consequently this appeal is fragmentary and premature and falls under the bar of the general rule forbidding fragmentary and premature appeals from an interlocutory order. *State v. Childs*, *supra*.

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**State v. Kelly**

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For the foregoing reasons this appeal must be dismissed.

Appeal dismissed.

Judges MARTIN (Harry C.) and WHICHARD concur.

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STATE OF NORTH CAROLINA v. BOBBY BRANDELL KELLY

No. 819SC1065

(Filed 16 March 1982)

**Homicide § 28— self-defense— omission from final mandate— prejudicial error**

The trial judge in a homicide prosecution erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury, and such error was not cured by the discussion of the law of self-defense in the body of the charge.

APPEAL by defendant from *Godwin, Judge*. Judgment entered 17 March 1981 in Superior Court, VANCE County. Heard in the Court of Appeals 9 March 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of second degree murder.

*Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.*

*Appellate Defender Adam Stein, and Assistant Appellate Defenders Ann B. Petersen and James R. Glover, for defendant appellant.*

WHICHARD, Judge.

The State's evidence tended to show that defendant struck Richard Dunston across the nose with a stick, and that Dunston died from the resulting injuries. Defendant's evidence tended to show that defendant hit Dunston after Dunston had cut him with a knife and while Dunston was still attacking him with the knife. Defendant testified:

I hit him with the stick so he wouldn't cut me again with the knife . . . I struck him with the stick to keep him from cutting me with the knife.

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State v. Kelly

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. . . . .  
... I didn't try to kill him or nothing. I just wanted to keep him off of me with the knife. If I hadn't of hit him in the head maybe he would have killed me. He was aiming at my throat. I swung the stick three times and he had the knife going and I swung two times and I missed and the third I hit I think twas somewhere under the eye.

The court instructed on the defense of self-defense in the main body of the charge. It failed to do so, however, in its final mandate to the jury, the pertinent portion of which was as follows:

So, finally, Ladies and Gentlemen, I charge you and instruct you that if you find from the evidence and beyond a reasonable doubt that on or about the 1st day of November, 1980, the defendant intentionally and with malice and without justification or excuse struck Richard Dunston with the stick which has been described in evidence in this case thereby proximately causing Dunston's death, it would be your duty to return a verdict of guilty of second degree murder. If, however, you fail to so find or if you find that you have a reasonable doubt as to one or more of those things, then you will go to and consider and say whether you find the defendant to be guilty of voluntary manslaughter, that is, if you find that he is not guilty, that the State has failed to satisfy you beyond a reasonable doubt that the defendant is guilty of murder in the second degree, you will not return a verdict of not guilty, but you will then go to and consider and say whether he is guilty of voluntary manslaughter.

If you come to consider that possible verdict and find from the evidence and beyond a reasonable doubt that on or about that date, November 1, 1980, the defendant intentionally and without justification or excuse struck Richard Dunston with a stick, which has been described in the presentation of evidence in this case, that that stick was a deadly weapon and that the blow thereby proximately caused Dunston's death, you would return a verdict of guilty of voluntary manslaughter. Such a finding on your part would mean that the State has failed to prove beyond a reasonable doubt that the [defendant] acted with malice, that is not in the heat of

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*State v. Kelly*

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passion upon adequate provocation. You would also return a verdict of guilty of voluntary manslaughter if you find beyond a reasonable doubt that the defendant intentionally struck Dunston with the stick, which has been described in evidence in this case, that that stick was a deadly weapon and thereby proximately caused Dunston's death, even if the State has not proved beyond a reasonable doubt that the defendant did not act in self-defense, provided that the State has proved beyond a reasonable doubt that in the exercise of self-defense the defendant used excessive force or was the aggressor, although without murderous intent in bringing on the affray with Dunston.

I may have failed in instructing you with respect to the circumstances under which you can return a verdict of guilty of murder in the second degree. The State must satisfy you from the evidence and beyond a reasonable doubt that the defendant intentionally and with malice and without justification used a deadly weapon, that the stick that has been described in evidence in this case was a deadly weapon under the rules that the Court has laid down for you.

If you find that the State has failed to [satisfy] you from the evidence and beyond a reasonable doubt that the defendant is guilty of voluntary manslaughter, you must return a verdict of not guilty and acquit the defendant.

In *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974), our Supreme Court held that the failure to include an instruction on self-defense in the final mandate to the jury was not cured by discussion of the law of self-defense in the body of the charge, and that such failure was prejudicial error entitling the defendant to a new trial. The Court stated, per Justice Moore:

At no time in this mandate did the court instruct the jury that if . . . defendant acted in self-defense, then the killing would be excusable homicide and it would be their duty to return a verdict of not guilty.

The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge,



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the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. The defendant was entitled under the law, following the mandate on manslaughter, to an instruction substantially as follows:

“If, however, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot [the victim] and thereby proximately caused his death, if you are further satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable grounds to believe and did believe that he was about to suffer death or serious bodily harm at the hands of [the victim], and under those circumstances he used only such force as reasonably appeared necessary, you the jury being the judge of such reasonableness, and you also are satisfied that the defendant was not the aggressor, then he would be justified by reason of self-defense, and it would be your duty to return a verdict of not guilty.”

*Id.*, 285 N.C. at 165-166, 203 S.E. 2d at 820. We find *Dooley* controlling here, and accordingly award a new trial because of the court's failure to include an instruction in its final mandate allowing the jury to find defendant not guilty by reason of self-defense. Because we make this disposition of defendant's appeal, we deem it unnecessary to discuss the other errors assigned.

New trial.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

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FRANCIS D. BUIE v. DANIEL INTERNATIONAL CORPORATION, D/B/A DANIEL  
CONSTRUCTION CO.

No. 8110SC494

(Filed 16 March 1982)

**1. Damages § 11.2; Master and Servant § 69—discharge for seeking workers' compensation benefits—no punitive damages**

No punitive damages may be recovered in an action based on an employee's discharge for seeking workers' compensation benefits since the

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wording of G.S. 97-6.1(b) clearly limits recovery to damages "suffered by the employee" as a result of the employer's violation of the Act.

**2. Master and Servant § 69; Unfair Competition § 1— employee's discharge for seeking workers' compensation benefits—no treble damages**

In an action based on an employee's discharge for seeking workers' compensation benefits, the trial court correctly dismissed the employee's claim for treble damages for defendant's alleged unfair trade practices in violation of G.S. 75-1.1 since employer-employee relationships do not fall within the intended scope of G.S. 75-1.1.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 19 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 8 January 1982.

Plaintiff brought this action for damages resulting from his alleged harassment and dismissal by defendant employer following his work-related injury. Plaintiff contends that defendant's action was taken pursuant to a policy designed to discourage employees from exercising their right to workers' compensation benefits. The trial court granted defendants' N.C.R.C.P. 12(b)(6) motion to dismiss plaintiff's claims for punitive and treble damages. Plaintiff appeals from this dismissal.

*Sanford, Adams, McCullough & Beard, by Charles H. Montgomery, Catherine B. Arrowood and Renee J. Montgomery, for plaintiff appellant.*

*Thompson, Mann and Hutson, by George J. Oliver and Susan L. Hartzoge, for defendant appellee.*

ARNOLD, Judge.

[1] In this case we are called upon first to decide whether punitive damages may be recovered in an action based on an employee's discharge for seeking workers' compensation benefits.

Plaintiff argues that the trial court erred in granting defendants' motion to dismiss plaintiff's punitive damages claim, contending that N.C.G.S. 97-6.1 does not preclude an award of punitive damages. We disagree.

As plaintiff correctly points out, G.S. 97-6.1 was passed by the legislature in response to this Court's holding in *Dockery v. Table Co.*, 36 N.C. App. 293, 244 S.E. 2d 272 (1978). The *Dockery*

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opinion stated that no private cause of action existed under North Carolina law for an employee's dismissal in retaliation for claiming workers' compensation benefits. The legislature expressly created such a right, with the passage of G.S. 97-6.1, in the next session of the General Assembly. However, the wording of the statute clearly limits recovery to damages "suffered by the employee" as a result of the employer's violation of the Workers' Compensation Act. G.S. 97-6.1(b).

Punitive damages, by their very nature, are not damages "suffered" by anyone. Rather, they are damages awarded to punish a wrongdoer, over and above the amount required to compensate for the injury. Whether, as plaintiff argues, the purpose of the Workers' Compensation Act would be better served by the threat of punitive damages for its violation is not for this Court to decide. We are bound by the wording of G.S. 97-6.1, and any amendment thereto is within the realm of the legislature.

[2] Plaintiff's second argument is that the trial court erred in dismissing his claim for treble damages for defendant's alleged unfair trade practices in violation of G.S. 75-1.1. In support of this argument, plaintiff correctly notes that the scope of the statute was expanded by amendment in 1977 to apply to unfair practices "in or affecting commerce," whereas the earlier version of the statute had set forth a more limited prohibition of "unfair or deceptive acts or practices in the conduct of any trade or commerce." Plaintiff contends that the more expansive language of the current statute is broad enough to encompass "all forms of business activities, including employment practices." We conclude otherwise.

The 1977 statutory amendment to which plaintiff refers was passed in direct response to our Supreme Court's ruling in *State ex rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977). Overruling this Court, our Supreme Court, in *Penney*, held that G.S. 75-1.1 as then worded was so narrow in its application that financing practices pursuant to credit sales by a retail store were not included thereunder.

The Supreme Court's restrictive construction of the statute apparently had not been anticipated by the legislature. Indeed, the General Assembly acted immediately to amend the provision

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so as to bring its application into line with the declaration of legislative intent which had accompanied its passage:

The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and the consuming public within this State, to the end that good faith and dealings *between buyers and sellers* at all levels of commerce be had in this State. (Emphasis supplied.) *State ex rel. Edmisten v. J. C. Penney Co., supra*, at 316, 233 S.E. 2d 899.

Unlike buyer-seller relationships, we find that employer-employee relationships do not fall within the intended scope of G.S. 75-1.1, in spite of plaintiff's strained characterization of the latter as "sale of employment skills." Employment practices fall within the purview of other statutes adopted for that express purpose.

For the foregoing reasons, the order of the trial court dismissing plaintiff's claims for punitive damages and treble damages is

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; THE PUBLIC STAFF v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., AND PIEDMONT NATURAL GAS COMPANY, INC.

No. 8110UC545

(Filed 16 March 1982)

**Gas § 1; Utilities Commission § 22— natural gas rates—refunds to customers**

The Utilities Commission erred in ordering natural gas companies to pass refunds received from their supplier to their present customers since G.S. 62-136(c) requires that refunds be made to the customers who paid the charges and that these refunds be contingent upon practicability, the charges in question related to periods of ten to twenty-three years prior to the supplier refunds, and it would be impracticable to determine the identity of those customers to whom refunds might be due.

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APPEAL by respondents from N. C. Utilities Commission. Order entered 21 January 1981. Heard in the Court of Appeals 28 January 1982.

This is an appeal from an order requiring five natural gas companies to pass refunds received from their supplier to their customers.

Evidence presented by the Public Staff of the Utilities Commission showed that the natural gas supplier for the State, Transco, was required by the federal government in 1978 to make substantial refunds to its customers, including respondents. Respondents did not pass all of these refunds through to their customers, but credited some of them so as to benefit the companies' stockholders by subtracting the funds from the cost of gas supplies for the year 1978. The Public Staff argued that this was improper and that the full amount should be passed through to the gas companies' customers, citing G.S. 62-133(f) as the applicable statute. The Commission refused to apply G.S. 62-133(f), a statute relating to rate increases for the purpose of offsetting supplier increases, but construed G.S. 62-136(c), the statute applicable to customer refunds, to require the refunds in this case. The judgment required that payment of said refunds be made to the gas companies' present customers. Two of the respondent gas companies appealed.

*Public Staff of the N. C. Utilities Commission, by Chief Counsel Robert F. Page and G. Clark Crampton, for intervenor appellee.*

*Boyce, Morgan, Mitchell, Burns & Smith, by F. Kent Burns, for defendant appellant Public Service Co. of N. C., Inc.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos, for defendant appellee Piedmont Natural Gas Co., Inc.*

ARNOLD, Judge.

Respondents bring forth a number of assignments of error and challenge the sufficiency of the evidence to fulfill any one of the three statutory requirements set forth in G.S. 62-136(c). The statute provides that the Commission may require supplier refunds to be passed through to gas customers where three prerequisites are met. These are: (1) that the refund be prac-

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ticable, (2) that the charges have been included in rates paid by the customers, and (3) that the company has had a reasonable rate of return exclusive of the refund. If all of these requirements are met, the company may be ordered "to distribute said refund among said customers in proportion to their payment of the charges refunded." G.S. 62-136(c).

It is argued by respondents that the statutory language clearly requires that it must be practicable to make the refunds to the customers who paid the charges, and that the Commission's award to current customers of the gas companies was error.

The Public Staff defends the Commission's award as being consistent with the Commission's established policy. While we might be persuaded by prior policy if the statute were found to be ambiguous, such policy is impliedly overruled to the extent that it is inconsistent with the clear wording of a subsequent statute. Here, the wording of the statute clearly requires that refunds be made to the customers who paid the charges, and that these refunds be contingent upon practicability.

Determination of the identity of those customers to whom refunds might be due here, and of the relative proportion of their interests, in our view, would be impracticable since the charges in question relate to periods ranging from ten- twenty-three years prior to the supplier refunds. Therefore, one of the statutory prerequisites is unfulfilled, no refund is called for, and the Commission's contrary conclusion was erroneous.

We find it unnecessary to discuss the remaining assignments of error since our holding on the first argument requires that the judgment of the Commission be reversed.

Reversed.

Judges CLARK and WHICHARD concur.

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**McLean v. Roadway Express**

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WILLIAM T. MCLEAN, EMPLOYEE v. ROADWAY EXPRESS, INC., EMPLOYER  
SELF-INSURER

No. 8110IC597

(Filed 16 March 1982)

**Master and Servant § 77.1— modification of workers' compensation award error—  
no change in condition**

The Industrial Commission erred in concluding plaintiff had suffered a change in condition between the date of his first disability rating and the date of a hearing which increased his permanent partial disability from 30% to 50% where there was no evidence in the record to support the Commission's conclusion that plaintiff underwent "a substantial change, after a final award of compensation, of physical capacity to earn." G.S. 97-47.

APPEAL by defendant from the North Carolina Industrial Commission. Award entered 29 December 1980. Heard in the Court of Appeals 5 February 1982.

The record shows that plaintiff suffered a back injury in a work-related accident on 11 December 1976 while employed by defendant. He underwent an operation to relieve the effects of the injury, but continued to experience pain.

On 5 October 1977, plaintiff was examined by Dr. Frank Pollock and given a 30% partial disability rating. On the basis of this rating, plaintiff entered into a Supplemental Memorandum of Agreement with defendant which was approved by the Industrial Commission. The Commission granted plaintiff's petition for a lump sum payment and plaintiff was paid in full on 13 February 1978.

Upon receipt of his disability payment, plaintiff resigned from employment with defendant and entered the employ of Leonard Warner Datsun. Plaintiff remained in this employment at the time of the hearing below.

On 10 April 1978, plaintiff underwent a second operation on his back designed to improve his condition. This surgery was performed by Dr. Pollock. Plaintiff's condition improved following the second surgery, but then became worse again. About nine months after the second operation, Dr. Pollock gave plaintiff a 50% disability rating.

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By opinion and award filed 29 December 1980 the Industrial Commission granted plaintiff the increased benefits. The Commission's conclusion that plaintiff had suffered a change in condition was based on the following pertinent findings:

5. On January 30, 1979, some nine months following his second operation, the plaintiff was given a 50 percent permanent partial disability rating of his back by Dr. Pollock. As reasons for his rating Dr. Pollock identified the factors that the plaintiff had undergone a second operation and that he still suffered some discomfort and pain in his back. This rating followed a lengthy period during which the plaintiff received post-operative (sic) treatment from Dr. Pollock.

6. The reason Dr. Pollock changed his rating of permanent partial disability from 30 percent to 50 percent of the back was that the plaintiff had undergone a second operation on his back which involved a Gill type procedure lateral gutter type fusion, exploration of the nerve roots, and spinal cord, and that the plaintiff was still experiencing discomfort in the low back region.

*Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for plaintiff appellee.*

*Blackwell, Blackwell, Canady & Eller, by Jack E. Thornton, Jr. for defendant appellant.*

ARNOLD, Judge.

Defendant assigns as error the Commission's conclusion that plaintiff had suffered a change in condition between the date of his first disability rating and the date of hearing which increased his permanent partial disability from 30% to 50%. Defendant challenges the adequacy of the factual foundation for this conclusion which was set forth in finding of fact #6:

6. The reason Dr. Pollock changed his rating of permanent partial disability from 30 percent to 50 percent of the back was that the plaintiff had undergone a second operation on his back . . . and that the plaintiff was still experiencing discomfort in the low back region.

Defendant asserts that Dr. Pollock merely changed his opinion as to the extent of plaintiff's disability after the second opera-



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tion failed to improve his condition. "A mere change of the doctor's opinion with respect to claimant's preexisting condition," defendant notes "does not constitute a change of condition required by G.S. Section 97-47." *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 577, 227 S.E. 2d 627, 631 (1976).

Defendant argues that there was no evidence of a worsening of plaintiff's condition as a result of the second operation since Dr. Pollock testified that he "saw very little difference in his condition in '77 and '79." Moreover, the record reveals no basis for Dr. Pollock's opinion changing his rating from 30 percent to 50 percent partial disability rating.

It is well settled in cases construing G.S. 97-47 that "change of condition," as contemplated by the statute, means "a substantial change, after a final award of compensation, of physical capacity to earn . . . ." *Tucker v. FCX*, 36 N.C. App. 438, 444, 245 S.E. 2d 77, 80 (1978). We must agree with defendant that there is no evidence in the record to support the Commission's conclusion that the plaintiff here underwent such a change of condition.

Plaintiff asserts as an alternative ground for upholding the Commission's award that he never received a "final rating" and was therefore not bound by the Supplemental Memorandum of Agreement with defendant. We cannot agree. While it is possible that Dr. Pollock did not intend for the original disability rating to be "final," plaintiff's reliance on that rating in entering into the agreement with his employer and the Commission's approval of the agreement operated to "finalize" the rating. As stated by this Court in *Watkins v. Motor Lines, Inc.*, 10 N.C. App. 486, 489, 179 S.E. 2d 130, 132 (1971), "[a]n agreement to pay compensation, when approved by the Industrial Commission, is equivalent to an award." According to the statute, an award may be reviewed solely "on the grounds of a change in condition . . . ." As noted previously, plaintiff here failed to fulfill this threshold requirement.

We conclude that the Commission's findings and conclusion of law that plaintiff suffered a change of condition is unsupported by the evidence and must be reversed.

Reversed.

Judges CLARK and WHICHARD concur.

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**Patterson v. Phillips**

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**BETTIE LUE PATTERSON v. JOE GLEN PHILLIPS**

No. 8125DC519

(Filed 16 March 1982)

**Appeal and Error § 6; Contempt of Court § 8 — acquittal of criminal contempt—no right of appeal**

Plaintiff could not appeal from an order finding that an attorney was not guilty of criminal contempt in a proceeding seeking to hold the attorney in contempt based upon alleged interference with a child custody order. G.S. 5A-17.

APPEAL by plaintiff from *Vernon, Judge*. Order entered 13 February 1981 in District Court, CALDWELL County. Heard in the Court of Appeals 13 January 1982.

This is a domestic relations case in which the plaintiff sought to have defendant's attorney, William C. Palmer, held in contempt. Plaintiff's attorney filed an affidavit charging attorney Palmer with criminal contempt in harboring a child for the purpose of resisting and interfering with a court order granting temporary custody of the child to the plaintiff. A show cause order was issued and a hearing was held. An order was entered finding detailed facts as to attorney Palmer's conduct and concluding that the conduct did not constitute contempt. Plaintiff gave notice of appeal as to this order.

*Edward H. Blair, Jr., for plaintiff appellant.*

*Wilson, Palmer & Cannon, by Bruce L. Cannon, for respondent appellee William C. Palmer.*

ARNOLD, Judge.

Initially, we consider whether the trial court's order is appealable. G.S. 5A-17 provides, "A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge." G.S. 5A-24 provides, "A person found in civil contempt may appeal in the manner provided for appeals in civil actions." Our statutes make no provision for appeal when a person is found not in contempt.

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We consider the appealability of such an order in *Equipment Co. v. Weant*, 30 N.C. App. 191, 226 S.E. 2d 688 (1976). In that case the plaintiff and defendants entered a consent judgment on 23 June 1975. Shortly thereafter, the plaintiff sought to have defendants held in contempt for violating the consent judgment. The trial court found defendants not guilty of contempt and the plaintiff appealed. This Court wrote:

At the outset we face the question whether appeal lies to review an order dismissing a charge of indirect civil contempt. We hold that it does where, as here, the order affects a substantial right claimed by the appellant. G.S. 1-277(a). Had defendants been adjudged guilty of the contempt charged, they would have had the right to appeal expressly granted by statute, G.S. 5-2 [since repealed]. That statute, however, makes no reference to an appeal from an order adjudging an alleged contemnor not guilty, and our attention has been directed to no other statute or case authority of this State which expressly deals with the question. Decisions elsewhere are divided. *See* Annot. 24 A.L.R. 3d 650, "Appealability of Acquittal from or Dismissal of Charge of Contempt of Court." In the only North Carolina case cited in that Annotation, *Murray v. Berry*, 113 N.C. 46, 18 S.E. 78 (1893), our Supreme Court declined to review the action of the trial court in refusing to attach respondents for contempt. In that case, however, the Court found that the rights which plaintiffs sought to enforce by the contempt proceeding could be more properly determined in a pending civil action brought by respondents to partition land, title to which was in question. In the case now before us, we are aware of no other proceeding by which plaintiff can enforce its rights under the consent judgment dated 23 June 1975 than by the contempt proceedings which plaintiff now seeks to have us review. Since the order denying plaintiff the relief sought clearly affects a substantial right of the appellant, that is, the right to have the 23 June 1975 judgment enforced, we hold that the present appeal lies by virtue of G.S. 1-277(a). *See* § 7 of Annot., 24 A.L.R. 3d 650, cited *supra*.

30 N.C. App. at 194-95, 226 S.E. 2d at 690.

*Weant* involved a charge of civil contempt. The charges in the present case are in the nature of criminal contempt.

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Proceedings for contempt are of two classes, criminal and civil. Criminal proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders. Civil proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. Criminal proceedings, involving as they do offenses against the courts and organized society, are punitive in their nature, and the government, the courts, and the people are interested in their prosecution. Whereas civil proceedings, having as their underlying purpose the preservation of private rights, are primarily remedial and coercive in their nature, and are usually prosecuted at the instance of an aggrieved suitor. 12 Am. Jur., Contempt, section 6.

*Galyon v. Stutts*, 241 N.C. 120, 123, 84 S.E. 2d 822, 825 (1954); see G.S. 5A-11 and -21.

The present case is not like *Weant* in which the plaintiff was seeking to enforce her rights under a prior judgment or court order. Attorney Palmer did not have custody of the plaintiff's child at the time these proceedings were instituted, and the plaintiff was not seeking to regain custody or to enforce the child custody order by way of these contempt proceedings. Rather, the present proceedings were instituted to vindicate the dignity of the court and to punish attorney Palmer for his alleged interference with the custody order. Although they arise in a civil case, such contempt proceedings are criminal in nature. *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 169 S.E. 2d 867 (1969). The government, the courts and the people have an interest in the prosecution of criminal contempt charges; however, the plaintiff individually has no substantial right to the relief requested. Attorney Palmer was absolved by the trial court, and we conclude that this acquittal does not affect any substantial right of the plaintiff. She may not appeal. Although there is some division of authority, we note that courts in other jurisdictions generally agree that no appeal lies to review an acquittal from criminal contempt charges. Annot., 24 A.L.R. 3d 650, § 3 (1969).

Appeal dismissed.

Judges CLARK and WHICHARD concur.

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**State v. Rogers**

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STATE OF NORTH CAROLINA v. JAY KENNETH ROGERS

No. 8128SC576

(Filed 16 March 1982)

**Searches and Seizures § 11— search of vehicle proper—probable cause existed**

A police officer had probable cause to believe defendant's automobile contained stolen property where (1) the officer knew goods had been taken from a business a few days previously; (2) the defendant had returned a part of the goods for a reward; (3) the defendant had tried to avoid the officer; and (4) the defendant's automobile was in the area in which defendant was apprehended.

Judge WELLS concurring.

APPEAL by defendant from *Allen, Judge*. Judgment entered 17 December 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 November 1981.

The defendant was tried for felonious breaking or entering and felonious larceny. The State's evidence tended to show that Jim's Auto Sales in Asheville was broken into on 25 September 1980 and among the items missing were a briefcase containing automobile titles and an AM/FM Audiovox Converter. The manager of Jim's Auto Sales offered a reward of \$100.00 for the return of the briefcase. The defendant delivered the briefcase to Jim's Auto Sales and collected the reward.

Jimmy W. Moore testified that he is a detective with the Asheville Police Department. When he learned the defendant had delivered the briefcase to Jim's Auto Sales he began searching for him. Jimmy W. Moore testified further that he went to Sweeten Creek Drive In and discovered the defendant left shortly after he arrived, that the defendant went behind the building, crossed a brook and a railroad track and went into some woods. The defendant ran into a fence and then returned to the railroad tracks and was heading in an easterly direction on the tracks when he was stopped by Mr. Moore. The detective brought the defendant back to a police car parked in the Sweeten Creek Drive In parking lot and advised him of his rights. After advising the defendant of his rights, Mr. Moore asked for permission to search the defendant's vehicle which was parked in the parking lot. The defendant refused and Mr. Moore told him he would have the vehicle stored. The defendant responded: "Well, if you're going to

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store it, you can go ahead and look in it." At this point in the officer's testimony, the defendant made a motion to suppress all evidence found as a result of the search of the automobile.

The court conducted a *voir dire* hearing out of the presence of the jury at which Mr. Moore testified the defendant gave him the automobile keys. Mr. Moore opened the trunk and found the AM/FM Audiovox converter. Mr. Moore testified further that at the time he searched for the defendant, he knew the type car the defendant was driving. On cross-examination, Mr. Moore testified he did not tell the defendant he would store the automobile for the sole purpose of getting permission to search it. The owner of Sweeten Creek Drive In had told him he did not want the vehicle left on the premises. The court made findings of fact consistent with the evidence and denied the defendant's motion to suppress.

The defendant was found not guilty of breaking or entering and guilty of felonious larceny. He appealed from the imposition of a prison sentence.

*Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.*

*Assistant Public Defender Robert L. Harrell for defendant appellant.*

WEBB, Judge.

The defendant brings forward one assignment of error. He argues that any evidence as to the converter being found in the trunk of the defendant's automobile should have been suppressed because it was found as the result of an unconstitutional search of defendant's automobile. He contends that he did not give his consent to search the vehicle, that the officer did not have probable cause to believe the defendant's automobile contained stolen property and the officer had no right to search the vehicle incident to the arrest because the defendant was not in or near his automobile when he was arrested.

We hold the officer had probable cause to believe there were stolen goods in the vehicle and the search was legal. There have been many cases dealing with warrantless searches of automobiles. *See State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978) and the cases cited therein. We believe the rule is that if an

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officer has a belief, reasonably arising out of the circumstances known to the officer that an automobile contains stolen goods, this gives him probable cause to search the vehicle and he may do so without a warrant if exigent circumstances make it impractical to secure a search warrant. Exigent circumstances exist if the impounded vehicle is stopped on or near a public highway.

In this case the officer knew goods had been taken from Jim's Auto Sales a few days previously; that the defendant had returned a part of the goods; that the defendant had tried to avoid the officer when he came to Sweeten Creek Drive In; and that the defendant's automobile was in the Drive In parking lot. Under these circumstances it was reasonable for the officer to believe the defendant's vehicle contained stolen goods. The vehicle was close to a public street which meets the exigent circumstances requirement. The officer could lawfully search the defendant's vehicle without a search warrant. The fact that defendant was not at the vehicle at the time of his arrest makes no difference.

No error.

Judge MARTIN (Robert M.) concurs.

Judge WELLS concurs in the result.

Judge WELLS concurring.

I concur in the result because I am persuaded that defendant freely and voluntarily, without coercion, consented to the search of his automobile.

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STATE OF NORTH CAROLINA v. GROVER FLOYD

No. 8116SC897

(Filed 16 March 1982)

**Criminal Law § 85.1— evidence of defendant's reputation**

Where a witness testifies that he has lived for some time in the same community with the person whose character is at issue, has known that person

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*State v. Floyd*

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personally, and has heard nothing negative about him, the witness's testimony is admissible as evidence of reputation.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 7 April 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 3 February 1982.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury.

State's evidence tended to show that in the early morning hours of 27 December 1980, the defendant shot one Fred Powers outside a discotheque in Lumberton, North Carolina. The prosecuting witness testified that defendant attacked him without provocation. Defendant claimed the gun accidentally discharged when the prosecuting witness grabbed the defendant and wrestled him to the ground. There were no other eyewitnesses to the shooting.

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury and defendant was sentenced to three years imprisonment. Defendant appeals.

*Attorney General Edmisten, by Associate Attorney Michael Rivers Morgan, for the State.*

*John Wishart Campbell for defendant appellant.*

ARNOLD, Judge.

Defendant's sole assignment of error is that the trial court wrongfully excluded the testimony of two witnesses called by the defense to attest to defendant's good character. Defendant argues that both witnesses testified that they had known him for a number of years and were familiar with his reputation. Defendant asserts that the court's exclusion of their testimony on grounds that it was not based on what they had heard others say about defendant was error. We agree.

While it is well established that proof of character presented as evidence of one's conduct on a given occasion must be based on one's reputation in the community rather than specific acts or the personal opinion of a witness, it does not follow that the only acceptable evidence of reputation is what the witness has "heard."



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*State v. Riley*

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Indeed, what the witnesses here had *not* heard about the defendant, *e.g.* derogatory comments, may have been far better evidence of his reputation.

We conclude that where a witness testifies that he has lived for some time in the same community with the person whose character is at issue, has known that person personally, and has heard nothing negative about him, the witness's testimony is admissible as evidence of reputation. *See State v. Carden*, 209 N.C. 404, 183 S.E. 898 (1936), 1 Stansbury's N.C. Evidence § 110 (Brandis Rev. 1973). The trial court erred in concluding otherwise.

In the case at bar, there were no witnesses to the disputed events other than the defendant and the prosecuting witness. The outcome of the trial, therefore, necessarily turned on which version of the facts the jury believed, *i.e.* which witness the jury found more credible. Accordingly, we find the court's error in excluding evidence of defendant's reputation was prejudicial and entitles him to a

New trial.

Judges CLARK and WHICHARD concur.

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STATE OF NORTH CAROLINA v. BRODIE THOMAS RILEY

No. 8114SC831

(Filed 16 March 1982)

**Assault and Battery § 15.5— no duty to retreat from alleged attack—instruction required**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in failing to instruct that defendant, being in his own home, had no duty to retreat from an alleged attack by his estranged wife as there was ample evidence from which the jury might have determined that defendant acted in self-defense.

APPEAL by defendant from *Winberry, Judge*. Judgment entered 18 March 1981, in Superior Court, DURHAM County. Heard in the Court of Appeals 13 January 1982.

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**State v. Riley**

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Defendant was charged in an indictment, proper in form, with assault with a deadly weapon with intent to kill inflicting serious injury. According to what the State's evidence tended to show at trial, defendant's estranged wife, the prosecuting witness (Mitchner), came to defendant's mobile home on the night of 8 March 1980, to pick up some of her personal belongings. When defendant met her at the door, he had a rifle in his hand and he told her he was going to kill her. Mitchner panicked, grabbed a cooking pot, and ran down the hall, seeking safety in the bathroom. In the bathroom, however, she found defendant's 17 year-old daughter by a previous marriage and a woman whom defendant was seeing. Defendant, having pursued her, pushed the rifle against her and shot. Mitchner suffered from a wound to the left breast requiring surgery; the pathway of the bullet went through her stomach and her duodenum, and injured the portal vein.

The defendant's evidence tended to show that, on the day in question, the defendant had been sick and had gone to bed, leaving his daughter to do housework. A woman, Geneva McKinney, visited defendant and was there when Mitchner called to say she was coming over. When she got there, Mitchner, a rather large woman, broke open the locked front door and demanded to know "Where is the whore at?" She grabbed the kitchen pot, strewing brunswick stew over the floor, the draperies, and the sofa, and she rushed down the hall after Ms. McKinney. After she hit Ms. McKinney over the head several times, defendant, who had obtained his gun, warned Mitchner to leave. When Mitchner seemed not to hear and as she advanced toward defendant with pot upraised, defendant shot her. Thereafter he let the wounded woman call for medical help, and he told her also to call the sheriff. An investigator with the Durham County Sheriff's Department testified for the defense and verified that the night latch (a chain lock) on the interior wooden door to the trailer had been broken, appearing to have been forced. He was allowed to corroborate parts of the testimony of defendant, Ms. McKinney, and defendant's daughter by relating what they had told him immediately after the incident and by his description of the premises.

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State v. Riley

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The jury returned a verdict of guilty to assault with a deadly weapon inflicting serious injury. From judgment suspending a four to six year prison term, defendant appeals.

*Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for the State.*

*Maxwell, Freeman and Beason, P.A., by James B. Maxwell, for the defendant-appellant.*

ARNOLD, Judge.

Defendant excepted to the failure of the trial court to charge the jury that defendant, being in his own home, had no duty to retreat from the alleged attack by his estranged wife. We think this exception is well taken and must be sustained.

Contrary to the State's contention, there was ample evidence from which the jury might have determined that defendant acted in self-defense. Indeed the trial court instructed on the question of self-defense, but it failed to charge that defendant, in his own home, had no duty to retreat from the alleged attack by the prosecuting witness. This failure constituted error, *State v. Frizzelle*, 243 N.C. 49, 89 S.E. 2d 725 (1955), for which there must be a new trial.

Defendant's only other assignment of error relates to the trial court's shorthand instructions on defendant's right to defend against a nonfelonious assault. Since this alleged error is unlikely to recur at trial, we need not discuss it here.

New trial.

Judges CLARK and WHICHARD concur.

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**Mechanic Construction Co. v. Haywood**

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PHIL MECHANIC CONSTRUCTION COMPANY, INC. AND JOHN E. SHACKELFORD, SUBSTITUTE TRUSTEE v. CONRAD HAYWOOD AND GENEVA HAYWOOD

No. 8129SC425

(Filed 16 March 1982)

**Courts § 6— appeal to superior court from clerk—failure to perfect appeal in time**

The superior court had no jurisdiction to review an order of the clerk denying a request for a foreclosure sale of property securing a deed of trust where petitioners failed to perfect their appeal by giving notice of appeal within ten days after entry of the order as required by G.S. 1-272.

APPEAL by petitioners from *Lamm, Judge*. Judgment entered 20 January 1981, in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 9 December 1981.

A special proceeding was instituted by petitioners on 13 March 1980 to foreclose on a deed of trust. A hearing was conducted by the Clerk of Superior Court of Rutherford County on 3 April 1980, at which time the request of petitioners for sale by foreclosure was denied. Petitioners gave notice of appeal to the Superior Court on 15 April 1980. The matter was placed on the Superior Court calendar for the September 1980 and 12 January sessions of court, but neither the petitioners nor their representative appeared in court at either session. The appeal was dismissed by order dated 20 January 1981 for failure of the petitioners to appear and prosecute. Petitioners appeal from the order.

*Riddle, Shackelford and Hyler, by John E. Shackelford, for petitioner appellants.*

*George R. Morrow and J. H. Burwell, Jr., for respondent appellees.*

MORRIS, Chief Judge.

Petitioners cite authority for the proposition that the court erred in its dismissal of the proceeding for failure to prosecute, because there was no finding that petitioners engaged in delay tactics. They also contend that the court improperly dismissed the action on its own motion, and note that there is no indication

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Fliehr v. Fliehr

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in the order of the Superior Court with respect to whether the case was ever reached for hearing.

We deem it unnecessary to speak to the issues of deliberateness of delay, the source of the motion to dismiss, or whether the matter came to be heard, as petitioners failed to perfect their appeal from the order of the Clerk by giving notice of appeal to the Superior Court within ten days of the entry of the order as required by G.S. 1-272. The court was, therefore, without jurisdiction to review the ruling. *Spaulding Division of Questors Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E. 2d 501, cert. denied, 300 N.C. 375, 267 S.E. 2d 678 (1980).

Vacated and remanded for entry of an order of dismissal.

Judges HEDRICK and MARTIN (Robert M.) concur.

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LESLIE GOODMAN FLIEHR v. RICHARD M. FLIEHR

No. 8126DC570

(Filed 16 March 1982)

**Appeal and Error § 6.2— child support order in conjunction with alimony pendente lite—no right of appeal**

Orders for child support which are entered in conjunction with orders awarding alimony *pendente lite* are not appealable until entry of a final order on the claim for permanent alimony.

APPEAL by defendant from *Lanning, Judge*. Order entered 7 January 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 3 February 1982.

This is an appeal by defendant husband from an award to plaintiff wife of child support and alimony pendente lite.

*Michael S. Shulimson and Marvin Schiller for plaintiff appellee.*

*Mraz and Michael, by Mark A. Michael, for defendant appellant.*

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**Fliehr v. Fliehr**

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ARNOLD, Judge.

We hold that this appeal must be dismissed as interlocutory according to this Court's holding in *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981).

In this case, unlike that in *Stephenson*, the child support order is not designated *pendente lite* by the court. However, we conclude that the policy articulated in *Stephenson* will be largely defeated if we permit appeals of right from child support orders entered in conjunction with orders for alimony *pendente lite*. As we stated in *Stephenson*, the backlog of appeals awaiting review by this Court is now so great that usually the only feasible purpose for pursuing appeals from temporary support orders is to delay execution of the orders. It is our intent to eliminate use of this Court to achieve this unacceptable purpose. We conclude, therefore, that orders for child support which are entered in conjunction with orders awarding alimony *pendente lite* are not appealable until entry of a final order on the plaintiff's claim for permanent alimony. To hold otherwise, moreover, would allow appeal from an order which adjudicates fewer than all claims in violation of G.S. 1A-1, Rule 54(b). The order therefore is not subject to review by appeal and is

Dismissed.

Judges CLARK and WHICHARD concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 MARCH 1982

ALLEN v. ALLEN No. 8121DC407	Forsyth (79CVD3644)	Affirmed
DAVENPORT v. DAVENPORT No. 813DC662	Pitt (80CVD536)	Affirmed
MERCER v. LAWYERS TITLE INSURANCE No. 815DC627	New Hanover (80CVD869)	Reversed
ROSS v. MILLER No. 8120SC723	Union (74CV534)	Affirmed
STATE v. BLACK No. 8110SC933	Wake (80CRS69561)	No Error
STATE v. BURNS No. 8116SC491	Robeson (80CRS14208)	No Error
STATE v. COPELAND No. 8126SC932	Mecklenburg (80CRS89464) (80CRS89465)	No Error
STATE v. HARRIS No. 8121SC1068	Forsyth (80CRS3350)	Affirmed
STATE v. HARVIN No. 818SC1040	Wayne (81CRS2293)	No Error
STATE v. JONES No. 8118SC1112	Guilford (80CRS31480)	No Error
STATE v. McLAUGHLIN No. 8112SC1090	Cumberland (80CRS43601)	No Error
STATE v. VINSON No. 818SC978	Wayne (80CR15618) (80CR15620)	No Error
STATE v. WHILHITE & RANKIN No. 8118SC911	Guilford (81CRS15679) (81CRS17390)	No Error
STATE v. WOODY No. 8125SC884	Catawba (80CRS15703)	No Error

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**State v. Mackey**

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STATE OF NORTH CAROLINA v. BILLY RAY MACKEY

No. 8126SC585

(Filed 16 February 1982)

**Searches and Seizures § 11— warrantless search of van—absence of probable cause**

An officer did not have probable cause to search defendant's van for marijuana without a warrant where the officer knew only that a warrant had been issued for a search of a certain house for marijuana, that a small quantity of marijuana was found in the house along with packaging material for a much larger quantity, that immediately after a search of the house an all-points bulletin was put out for a blue Ford van and that the van which the officer subsequently searched matched that description, and the officer knew nothing of what a confidential informant had told a second officer about the possible use of the van for the storage or transportation of marijuana.

APPEAL by State from order of *Snepp, Judge*. Order entered 30 January 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 November 1981.

Defendant was charged in three separate indictments with felonious possession of marijuana, felonious possession of marijuana with intent to sell and deliver and felonious trafficking in marijuana. State stipulated that the prosecution of defendant on the charges arose out of the search of defendant's 1980 Ford van and the seizure, incidental to that search, of 418 pounds of marijuana.

Defendant filed a motion to suppress the marijuana. At a voir dire on 14 January 1981, thirty-five factual stipulations between State and defendant were introduced. They established the following pertinent facts:

In the spring of 1980, Officer J. S. Vail of the Charlotte Police Department received information from a reliable confidential informant that a certain house on Valley Road in Matthews, North Carolina, was being used as a storage point for large quantities of marijuana. Vail began surveillance of the house and observed defendant and defendant's blue Ford van there on several occasions. On the morning of 3 September 1980 Vail's informant told him that defendant had just brought a large quantity of marijuana to the house on Valley Road in his van where it was to be broken down and packaged for sale. The informant also stated



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that if the marijuana were moved to another location, it would be moved in defendant's van. Immediately after receiving this information, Vail drove to the house on Valley Road and observed defendant's blue Ford van parked in the driveway. He returned to the Police Department and obtained a warrant to search the premises on Valley Road. The application for the warrant sworn to by Officer Vail set forth the following facts to establish probable cause for the search:

I, J. S. Vail, have received information from a confidential and reliable informant who stated to me that a Bill Mackey and a Larry Campbell have in their possession at 9430 Valley Rd., Matthews, Meck. Co., North Carolina, U.S.A., a quantity of marihuana. This informant stated to this applicant that he has been inside the residence located at 9430 Valley Rd., Matthews, Meck. Co., N.C., U.S.A., within the past 48 hrs and has observed a quantity of marihuana inside this residence. This informant is familiar with marihuana, how it is packaged and distributed, and has related to this affiant that he has smoked marihuana in the past. This affiant has known this informant for approximately 8 months. This informant has given this affiant intelligence information on illegal drug traffic in the Charlotte Mecklenburg, N. C. area, which I have found to be true through my own independent investigations. This informant has given me information in the past that has led to the purchase of substances listed in the N. C. Controlled Substances Act, by an undercover police officer. These case are listed under compliant (sic) numbers 80-34894, 80-32410 and 80-31761. Based on the information contained in this application and the proven reliability of the aforementioned informant, I, J. S. Vail, request that a Search Warrant be issued for Bill Mackey, Larry Campbell and for 9430 Valley Rd., Matthew, Meck. Co., N. C., U.S.A., and any other occupants.

After obtaining the warrant, Officer Vail and Officer C. H. Parker returned to the Valley Road house to execute it. When they arrived, the blue van was gone, and no one was in the house. A search of the house produced five to six pounds of marijuana, a set of scales, and some large paper bags with marijuana residue in them. After the search, Vail put out an all-points bulletin over his police radio describing the blue Ford van and defendant. He

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asked that a marked police car check the rear of the apartment building at 811 East Morehead Street where he had seen the van parked on prior occasions. Vail and Parker were notified shortly thereafter that the van was in fact parked at the rear of that building. Upon arriving there, Vail left to search for a subject who had been seen leaving the building. Parker looked in the van's front window but could not see into the rear of the van because of a partition behind the seat. He then located defendant in the apartment building, identified himself as a police officer and informed defendant that he had a warrant to search the van. Defendant allowed Parker to search the van after Parker read the search warrant to him. Parker discovered and seized from the van the 418 pounds of marijuana upon which the present charges are based. Prior to the search Parker had never seen defendant. He had not been involved in Officer Vail's surveillance of the Valley Road house and had had no communications with Vail's informant.

Officers Vail and Parker both testified at the voir dire hearing. Officer Parker stated that he had been with Vail on the morning of 3 September 1980 prior to Vail's obtaining the search warrant and had observed the blue van parked in front of the Valley Road house. He further stated that Vail knew who owned the van and that they had discussed it along with the information which Vail had from his confidential informant.

In its order, the trial court incorporated the thirty-five stipulations between State and defendant into its findings of fact. It further found that prior to his execution of the search warrant on defendant's van, Officer Parker knew nothing of what any confidential informant had told Officer Vail about the possible use of the van in the storage or transportation of marijuana and had no independent knowledge of his own or from any other confidential informant concerning the possible use of the van in the storage or transportation of marijuana. The court concluded that although the search warrant contained sufficient probable cause to permit a valid search of the Valley Road house, it did not authorize a search of defendant's van and that Officer Parker did not have sufficient probable cause nor were there sufficient exigent circumstances to justify a warrantless search of the van. Defendant's motion to suppress was allowed.

State appeals from the allowance of defendant's motion.

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**State v. Mackey**

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*Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.*

*James, McElroy & Diehl, by Gary S. Hemric, for defendant appellee.*

MORRIS, Chief Judge.

State contends that the trial court erred in holding that there was neither probable cause nor exigent circumstances for the search and seizure conducted by Officer Parker. State does not contest the court's holding regarding the insufficiency of the search warrant to justify that search.

A warrantless search of an automobile may be constitutionally reasonable if there is probable cause to make the search. *Carroll v. U.S.*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Chambers*, 41 N.C. App. 380, 255 S.E. 2d 294, *disc. rev. denied*, 297 N.C. 698, 259 S.E. 2d 296 (1979).

Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials.

*State v. Simmons*, 278 N.C. 468, 471, 180 S.E. 2d 97, 99 (1971).

We note that the record contains no exceptions to the findings of fact or conclusions of law in the order appealed from. The court's findings are therefore deemed to be supported by substantial competent evidence and are conclusive on appeal. *Rice v. Peters, Comr. of Motor Vehicles*, 48 N.C. App. 697, 269 S.E. 2d 740 (1980). In addition, the scope of review is limited to whether the trial court's order is supported by the findings of fact and conclusions of law. App. R. 10(a).

The question facing us, therefore, is whether Officer Parker had probable cause, on the facts found by the trial court, to search defendant's van for contraband. Although Officer Parker

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testified at the voir dire that he had personally seen the blue van at the Valley Road house prior to the search of that house and that Officer Vail had discussed with him the information imparted to him by his informant, the trial court found that Parker had no knowledge, either independently or from Vail, of the van's possible use in the storage or transportation of the marijuana. As previously stated, this finding is conclusive on appeal.

Under the facts as found by the trial court, Parker knew only that a search warrant had been issued for the house on Valley Road based on probable cause to believe that a quantity of marijuana would be found there, that a small amount of marijuana was in fact found in the house along with packaging material for a much larger quantity, that immediately after the search, Officer Vail put out an all-points bulletin for a blue Ford van and that the van which Parker subsequently searched matched that description.

These facts are distinguishable from the facts in *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976) and *State v. Frederick*, 31 N.C. App. 503, 230 S.E. 2d 421 (1976) where probable cause was found. In *Phifer*, the officer conducting the warrantless search of an automobile had been informed by the radio dispatcher that the car had been seen outside a bank during a robbery and shooting at the bank. In *Frederick*, the officer conducting the warrantless automobile search had been told by another officer of information received from a confidential informant connecting the car and its occupants with a recent breaking and entering.

From the facts as found by the court in the present case, Officer Parker knew of no connection between defendant's van and the marijuana which had apparently been removed from the house on Valley Road. On these facts the trial court properly concluded that Officer Parker did not have probable cause to search the van.

There being no probable cause for the warrantless search, we need not reach the question of whether there were exigent circumstances to support it. The order is

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

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Stone v. Martin

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ADA PEARL STONE AND CECIL GLYNN JERNIGAN, INDIVIDUALLY, AND AS SHAREHOLDERS OF CREEKSIDE ENTERPRISES, INC. v. R. L. MARTIN, JR. AND LARRY G. SANDERFORD AND CREEKSIDE ENTERPRISES, INC.

No. 8010SC1061

(Filed 6 April 1982)

**1. Constitutional Law § 74; Rules of Civil Procedure § 33— request for discovery—right against self-incrimination—question for court**

Determination of whether the privilege against compulsory self-incrimination applies to requested discovery must be by the court, not by the individual claiming the privilege. G.S. 1A-1, Rule 26(b)(1).

**2. Constitutional Law § 74; Rules of Civil Procedure § 37— order compelling discovery—sanctions—punitive damages—right against self-incrimination**

The trial court's order compelling defendant to respond to interrogatories and requests for admissions and imposing sanctions and default judgment for his failure to do so did not violate defendant's constitutional right against compulsory self-incrimination because plaintiffs sought punitive damages for fraud and body execution where (1) the requested discovery would not necessarily tend to subject defendant to a punitive damages award, and (2) the trial court's order simply granted through discovery procedure access to information in corporate records which defendants refused to permit plaintiffs to inspect and which plaintiffs as shareholders could obtain in any event by mandamus pursuant to G.S. 55-37 and G.S. 55-38. G.S. 1A-1, Rule 37.

APPEAL by defendant R. L. Martin, Jr., from *Preston* and *Lee, Judges*. Order filed 31 March 1980 by *Judge Preston* and order and judgment filed 12 September 1980 by *Judge Lee*, in Superior Court, WAKE County. Heard in the Court of Appeals 1 May 1981. Reheard 10 December 1981.

Defendant R. L. Martin, Jr. (hereafter defendant), appeals from Judge Preston's order compelling him to answer interrogatories and requests for admission,<sup>1</sup> and from Judge Lee's order imposing the sanctions of striking his answer, prohibiting him from opposing claims or allegations set out in the complaint, and rendering judgment by default against him.

We allowed defendant's petition to rehear our former decision in this case, reported in 53 N.C. App. 600, 281 S.E. 2d 402 (1981), for the purpose of reconsidering its holding and rationale.

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1. See Appendix at end of opinion.

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We conclude from careful reconsideration that the holding should stand, but the rationale should be re-stated as set forth herein.

*Brenton D. Adams and Woodall, McCormick & Felment, by Edward H. McCormick, for plaintiff appellees.*

*Hunter, Wharton and Howell, by John V. Hunter, III, for defendant R. L. Martin, Jr.*

WHICHARD, Judge.

Plaintiffs, shareholders in defendant corporation, filed a complaint against the corporation and the individual defendants, who were officers, directors, and shareholders thereof, alleging numerous improper and unlawful acts and omissions in the operation of the corporation. They sought compensatory damages, punitive damages, and, as to the individual defendants, arrest and bail and execution against the person.

Plaintiffs served on defendant fifty-eight interrogatories and fifteen requests for admission. Defendant claimed with respect to each that because the complaint sought punitive damages, which are in the nature of a penalty, to answer would violate his privilege against compulsory self-incrimination under United States Constitution amendments V and XIV and North Carolina Constitution article I, section 23. Plaintiffs moved under G.S. 1A-1, Rule 37(a), to compel defendant to comply with discovery. Judge Preston found that three of the interrogatories and three of the requests for admission called for potentially incriminatory answers and denied plaintiffs' motion with respect thereto. He ordered defendant to answer the remaining interrogatories and requests within thirty days.

Upon defendant's failure to comply, plaintiffs moved for imposition of Rule 37(b) sanctions. Judge Lee struck defendant's answer and ordered that he not oppose any claim or allegations set forth in plaintiffs' complaint. He further ordered judgment by default against defendant, the issue of damages being for jury determination.

Defendant contends the orders compelling him to respond, and imposing sanctions for his failure to do so, infringe upon his constitutional privilege against compulsory self-incrimination. He

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does not contend that answering may subject him to criminal punishment; rather, he contends that because plaintiffs seek punitive damages and body execution, he cannot be compelled to submit to discovery. On this record we find no infringement of defendant's constitutional privilege.

G.S. 1A-1, Rule 37, provides, in part:

(a) *Motion for order compelling discovery.*—A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

. . . .

- (2) *Motion.*—If . . . a party fails to answer an interrogatory submitted under Rule 33 . . . the discovering party may move for an order compelling an answer . . . .

. . . .

(b) *Failure to comply with order.*—

. . . .

- (2) *Sanctions by Court in Which Action is Pending.*—If a party . . . fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule . . . , a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

- b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses

. . . ;

. . . .

Thus, if the court acted properly in compelling defendant to answer, upon his failure to do so the court had authority to impose sanctions. The court properly ordered defendant to answer if the information sought was discoverable.

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Under North Carolina discovery rules, subject only to limitation by court order, any party to a civil action is entitled to all information relevant to the subject matter of that action *unless such information is privileged*. G.S. 1A-1, Rule 26(b)(1). The right of discovery must yield, however, to the privilege against compulsory self-incrimination. *LaFontaine v. Southern Underwriters*, 83 N.C. 132, 138 (1880); *see also, e.g., Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). Thus, courts cannot compel disclosure of information which would tend to incriminate the person from whom it is sought and cannot impose sanctions on one who refuses to disclose privileged information.

In *Allred v. Graves*, our Supreme Court held that the North Carolina Constitution protects from compulsion, on discovery, to reveal matters which would necessarily tend to subject the disclosing party to verdicts or awards of punitive damages and executions against the person. 261 N.C. at 38, 134 S.E. 2d at 192. The rationale for extending the privilege from information which would subject to criminal punishment to information which, in civil cases, would necessarily tend to subject to punitive damages and body execution, was the penal nature of punitive damages and body execution under North Carolina law. With respect to the fifth amendment privilege against compulsory self-incrimination, the court adhered to principles espoused by the federal courts.

[1] In civil cases, as well as in matters which may subject to criminal punishment, "the privilege protects against real dangers, not remote and speculative possibilities." *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, 478, 32 L.Ed. 2d 234, 240, 92 S.Ct. 1670, 1675 (1972). "[I]t would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice." *Mason v. United States*, 244 U.S. 362, 366, 61 L.Ed. 1198, 1200, 37 S.Ct. 621, 622 (1917). Determination of whether the privilege applies must be by the court, not the individual claiming the privilege. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . ." *Hoffman v. United States*, 341 U.S. 479, 486, 95 L.Ed. 1118, 1124, 71 S.Ct. 814, 818 (1951).



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[T]o vacate an order for examination, . . . it must be plainly apparent that the evidence sought must *necessarily* tend . . . to subject [the party to be examined] to a penalty or forfeiture. . . . [The] plaintiff should not be denied a plain statutory right to examine defendants . . . before trial solely because they claim that any answers they make may subject them to a penalty. This rests the matter upon the *ipse dixit* of each defendant and not upon the judgment of the court.

*Allred*, 261 N.C. at 39, 134 S.E. 2d at 192-193 (emphasis in original). Because, "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee," the court must review the questions in the setting in which asked and require the witness to answer if "it clearly appears to the court that he is mistaken" in asserting the privilege. *Hoffman*, 341 U.S. at 486-487, 95 L.Ed. at 1124, 71 S.Ct. at 818. Further, the trial judge "is in [a] much better position to appreciate the essential facts than an appellate court . . . and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject." *Mason*, 244 U.S. at 366, 61 L.Ed. at 1200, 37 S.Ct. at 623 (1917).

[2] That plaintiffs seek punitive damages does not, *ipso facto*, entitle defendant to refuse, with impunity, to submit to the requested discovery. When defendant refused to respond, asserting privilege, plaintiffs properly sought trial court determination as to the propriety of the assertion. Plaintiffs had prayed for punitive damages "as punishment for the fraudulent conduct of . . . [defendant] . . . ." To establish fraud plaintiffs must show: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981); *Shreve v. Combs*, 54 N.C. App. 18, 21, 282 S.E. 2d 568, 571 (1981). None of the requested discovery to which the court ordered response would compel defendant to admit the calculation and intent requisite to establishment of fraudulent conduct. The responses, therefore, whether individually or collectively, would not necessarily tend to subject defendant to a punitive damages award. Review of the discovery requests in the setting in which

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made thus discloses no impropriety in the order that defendant respond.

Further, the requested discovery related almost entirely to the operation of defendant corporation, of which plaintiffs had been shareholders for more than six months preceding filing of their complaint. Plaintiffs thus had a statutory right, enforceable by an action in the nature of mandamus, to inspect the records of the corporation. G.S. 55-38. They had the further right, similarly enforceable, to inspect the annual financial statement of the corporation and the record of shareholders. G.S. 55-37; *White v. Smith*, 256 N.C. 218, 123 S.E. 2d 628 (1962). Plaintiffs alleged that defendants had denied their oral and written demands for opportunity to inspect the corporate records. The requested discovery to which the court ordered response sought information which the corporate records should have contained and which plaintiffs thus would have received had defendants complied with the statutory requirements for maintenance of corporate records and observed plaintiffs' right to inspect. "[T]he privilege against self-incrimination is a purely personal one," and "the official records and documents of [a corporation] that are held by [an individual] in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [the individual] personally." *United States v. White*, 322 U.S. 694, 699, 88 L.Ed. 1542, 1546, 64 S.Ct. 1248, 1251 (1944). It is thus evident that Judge Preston's order simply granted through discovery procedure access to information which plaintiffs could obtain in any event by mandamus.

It should be evident that tensions adhere within the law applicable to the area in which the problem presented falls, and that the standards prescribed for resolving those tensions are not necessarily easily applied in individual cases. We remain persuaded, however, from a careful examination of the standards and of the record in this case, that the standards were properly applied here.

For the foregoing reasons we affirm the order requiring defendant to comply with discovery. Because defendant failed to comply with that order, we find no abuse of discretion in the order imposing sanctions and judgment by default. See *Lain v.*

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*Loan Co.*, 46 N.C. App. 67, 264 S.E. 2d 381, *disc. rev. denied*, 300 N.C. 557, 270 S.E. 2d 109 (1980); *Silverthorne v. Land Co.*, 42 N.C. App. 134, 256 S.E. 2d 397, *disc. rev. denied*, 298 N.C. 300, 259 S.E. 2d 302 (1979); *Plumbing Co. v. Associates*, 37 N.C. App. 149, 245 S.E. 2d 555, *disc. rev. denied*, 295 N.C. 648, 248 S.E. 2d 250 (1978); W. Shuford, *North Carolina Civil Practice and Procedure* § 37-3 (2d ed. 1981).

Our opinion reported in 53 N.C. App. 600, 281 S.E. 2d 402 (1981) is withdrawn and is superseded by the opinion herein.

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

APPENDIX

The interrogatories to which defendant was ordered to respond were as follows:

1. List the name, telephone number and current address of each and every person who has any books or records relating to or involving Creekside Enterprises, Inc.

2. List the name, current address and telephone number of each and every person who has been employed by Creekside Enterprises, Inc.

3. List the complete assets of Creekside Enterprises, Inc. for each year of its existence including the present list of assets.

4. List the name, current address and telephone number of the purchaser of the business known as "Players" from Creekside Enterprises, Inc.

5. Set out in detail the terms of the sale of the business known as "Players" by Creekside Enterprises, Inc. (a copy of all contracts with the purchaser will be sufficient to answer this interrogatory).

6. List the total amount of consideration you paid for your interest in Creekside Enterprises, Inc. and list the total value of any voluntary contribution or loan you made to Creekside Enterprises, Inc.; and for each such item, state:

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a. The date upon which any such payment, contribution, or loan was made.

b. The amount of all payments, contributions, or loans.

c. The source of all payments, contributions and loans.

d. The amount of stock or other consideration received from you by the corporation for such payments, contributions, or loans.

e. List the date upon which you received anything of value from Creekside Enterprises, Inc. and for each such, state:

(1) The amount you received.

(2) The reason you received such asset from the corporation.

(3) The name of the person who authorized such payment by the corporation to you.

7. List and describe any personal services or labor you performed on behalf of Creekside Enterprises, Inc. and for each such instance, state:

a. Date upon which such work or labor was done.

b. The total hours involved in the labor or activity.

c. List and describe any payments received by you for such work, labor or activity.

8. State the various positions you occupied with Creekside Enterprises, Inc. from the time of its existence to the present date including any corporate offices you held and the dates of the same.

9. List the names and current addresses and telephone numbers of each and every person who has ever held stock in Creekside Enterprises, Inc. from the date of its existence until the present date.

10. List the names of the current stockholders of Creekside Enterprises, Inc. and set out by each person the amount of stock which they own.

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11. List the present creditors of Creekside Enterprises, Inc. along with their current addresses and telephone numbers.

12. List the names and current addresses and telephone numbers of each and every individual who has ever kept books for Creekside Enterprises, Inc. or who has, in any manner, assisted in the bookkeeping or record keeping of Creekside Enterprises, Inc.

13. List the names, current addresses and telephone numbers of each and every individual who has prepared or assisted in the preparation of any and all federal and state income taxes, quarterly reports or other such items of Creekside Enterprises, Inc.

14. List and describe the total income received by Creekside Enterprises, Inc. since its [in]corporation through the present date.

15. List and describe the total expenses of Creekside Enterprises, Inc. from its incorporation until the present date.

16. List the names and current addresses and telephone numbers of each and every agent, or employee, of the Internal Revenue Service or any other agency of the federal government and of the North Carolina Department of Revenue or any other agent of the state government with whom you had any dealings or contact whatsoever with regard to Creekside Enterprises, Inc.

17. For each such individual listed above, describe the subject matter of your dealings.

. . . .

20. List the names, current addresses and telephone numbers of each and every person who signed all checks drawn on the account of Creekside Enterprises, Inc.

21. List the amount of consideration that each stockholder paid for Creekside Enterprises, Inc.

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22. List the total assets held by the corporation known as Creekside Enterprises, Inc. before it started doing business and state the source of those assets.

23. State whether the corporation known as Creekside Enterprises, Inc. ever received any consideration for the stock originally issued to Brent Oakes.

24. State whether or not R. L. Martin, Jr. made a partial payment in the amount of \$600.00 for this stock and state whether or not that check was covered by sufficient funds.

25. State in detail what happened to the materials taken out of the club known as "Players" owned by Creekside Enterprises, Inc. State whether or not these materials which were taken out of the club including stainless steel sinks and other expensive items were not, in fact, taken to the office of R. L. Martin, Jr. In addition, state where these items are at the present time.

26. State how Larry G. Sanderford got his share of any stock he owns at Creekside Enterprises, Inc. State whether or not Sanderford's stock was paid for and, if so, describe the source of the funds used to pay for the stock.

27. State whether or not any stock which may have been owned by Brent Oakes was ever acquired by Larry G. Sanderford. If so, state whether or not the corporation ever received any consideration for this stock and whether Larry G. Sanderford ever paid Brent Oakes for the stock.

28. Describe in detail the circumstances leading up to the acquisition by Larry G. Sanderford of any stock in Creekside Enterprises, Inc. originally issued to or owned by Brent Oakes.

29. List and describe in detail any lease agreements entered into by Creekside Enterprises, Inc. or by the business known as "Players." (A complete copy of any such leases will be sufficient to answer this interrogatory.)

30. Describe in detail what happened to the money from the \$15,000 note that was to go into escrow for the lease agreement involving Creekside Enterprises, Inc.

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31. List and describe each and every promissory note executed by Larry Sanderford or R. L. Martin, Jr. in any connection related to Creekside Enterprises, Inc. or to the business known as "Players."

32. State whether or not Henry Brown is a stockholder of Creekside Enterprises, Inc. If so, state the amount of stock owned by Henry Brown and list any consideration paid by Henry Brown or any other person for this stock.

33. List the names, current addresses and telephone numbers of each and every officer of Creekside Enterprises, Inc. from the date of its incorporation through the present date as well as any and all members of the Board of Directors of Creekside Enterprises, Inc. from the date of its incorporation to the present date.

34. Describe in detail the policy of the business known as "Players" with regard to membership dues including a description of what went with the money collected for membership dues.

35. State the number of members accepted by the business as "Players."

36. List the names, current addresses and telephone numbers of each and every person who has or who has ever had possession of any corporate minute book kept by Creekside Enterprises, Inc.

37. List the dates of any and all stockholders meetings called by Creekside Enterprises, Inc. and list the name, current address and telephone number of each and every person who was present at such stockholders meeting.

38. With regard to the meetings set out above, state whether or not minutes were kept of such meetings and state the name, address and telephone number of any and all persons who have possession of the minutes of any such meeting.

39. Describe in detail all circumstances relating to the firing of Lee Webb by the business known as the "Players." In this description, include in detail an account of any allegations made by Lee Webb to the effect that books kept by

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Vickie Grissom were not in accordance with the actual records of the business and did not accurately account for the money taken in by the business known as the "Players."

40. Describe in detail all dealings and relationships between Vickie Grissom and Creekside Enterprises, Inc. and the business known as "Players." In this description, state in detail any capacity in which Vickie Grissom was employed by the corporation of the "Players" and describe what her function was during all times since the incorporation of Creekside Enterprises, Inc.

. . . .

42. Describe any and all functions or jobs that Bobby Richardson did on behalf of Creekside Enterprises, Inc. or "Players"; include in your description the dates during which Bobby Richardson was employed by Creekside Enterprises, Inc. or the business known as "Players." List the current address and telephone number of Bobby Richardson.

43. Describe any and all functions or jobs that Brent Oakes did on behalf of Creekside Enterprises, Inc. or "Players"; include in your description the dates during which Brent Oakes was employed by Creekside Enterprises, Inc. or the business known as "Players." List the current address and telephone number of Brent Oakes.

44. Describe any and all functions or jobs that Frankie Carroway did on behalf of Creekside Enterprises, Inc. or "Players"; include in your description the dates during which Frankie Carroway was employed by Creekside Enterprises, Inc. or the business known as "Players." List the current address and telephone number of Frankie Carroway.

45. Describe any and all functions or jobs that Lee Webb did on behalf of Creekside Enterprises, Inc. or "Players"; include in your description the dates during which Lee Webb was employed by Creekside Enterprises, Inc. or the business known as "Players." List the current address and telephone number of Lee Webb.

46. List the date upon which the business known as "Players" started doing business and list the date upon which that business was sold by Creekside Enterprises, Inc.



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47. List and describe all assets owned by R. L. Martin, Jr., either solely owned or owned jointly with others.

48. List and describe all assets owned by Larry G. Sanderford, either solely owned or owned jointly with others.

49. List and describe all parcels of real estate owned by R. L. Martin, Jr., either solely or jointly with others, including entireties property; and for each such parcel, state:

a. All owners of that parcel and the portion of the whole which each owner holds.

b. Date of purchase.

c. Purchase price.

d. The current amount of any encumbrance upon the property.

e. Tax value as determined by the respective taxing authorities.

f. Current net annual income received from each parcel.

50. List and describe all parcels of real estate owned by Larry G. Sanderford, either solely or jointly with others, including entireties property; and for each such parcel, state:

a. All owners of that parcel and the portion of the whole which each owner holds.

b. Date of purchase.

c. Purchase price.

d. The current amount of any encumbrance upon the property.

e. Tax value as determined by the respective taxing authorities.

f. Current net annual income received from each parcel.

51. State R. L. Martin, Jr.'s current net worth.

52. State Larry G. Sanderford's current net worth.

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53. List the name and address of any person, firm, partnership or corporation from which R. L. Martin, Jr. has obtained a loan of any amount or description within five years from the date of these interrogatories.

54. List the name and address of any person, firm, partnership or corporation from which Larry G. Sanderford has obtained a loan of any amount or description within five years from the date of these interrogatories.

55. List each and every person, firm, corporation or partnership to which a financial statement dealing with R. L. Martin, Jr. has been given, loaned, or supplied within five years from the date of these interrogatories. For each such listing above, state:

a. The date upon which such statement was given.

b. The name, current address and telephone number of each person to whom such statement was given.

c. The name, current address and telephone number of each person who currently has custody or possession of either the original or a copy of any such statements.

56. List each and every person, firm, corporation or partnership to which a financial statement dealing with Larry G. Sanderford has been given, loaned, or supplied within five years from the date of these interrogatories. For each such listing above, state:

a. The date upon which such statement was given.

b. The name, current address and telephone number of each person to whom such statement was given.

c. The name, current address and telephone number of each person who currently has custody or possession of either the original or a copy of any such statements.

57. State the adjusted gross income of R. L. Martin, Jr. for the years 1973 through 1978 as shown on his Federal income tax returns.

58. State the adjusted gross income of Larry G. Sanderford for the years 1973 through 1978 as shown on his Federal income tax returns.

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The requests for admission to which defendant was ordered to respond were as follows:

1. That the corporation known as Creekside Enterprises, Inc. owned the business known as "Players" for a period of time until it was sold on or about the 7th day of May, 1979.

2. That during the time that Creekside Enterprises, Inc. owned the business known as "Players" that business was profitable and the corporation known as Creekside Enterprises, Inc. realized a profit from the operation of that business.

3. That the United States Internal Revenue Service has determined that Creekside Enterprises, Inc. has earned a profit upon which it had not paid federal income taxes.

4. That R. L. Martin, Jr. and Larry G. Sanderford are officers and directors of the defendant Creekside Enterprises, Inc.

5. That Ada Pearl Stone and Cecil Glynn Jernigan, through their attorneys, have made demand upon R. L. Martin, Jr. and Larry G. Sanderford for inspection of [Creekside Enterprises,] Inc. and the record of shareholders or the voting list of Creekside Enterprises, Inc. and that in spite of such demands, the defendants, R. L. Martin, Jr. and Larry G. Sanderford, have refused and still refuse to allow the plaintiffs to make the inspections that have been requested.

6. That at all times mentioned in the complaint, R. L. Martin, Jr. and Larry G. Sanderford have exercised control over the corporation known as Creekside Enterprises, Inc.

7. That Creekside Enterprises, Inc. has assets over and above its liabilities and that the net worth of Creekside Enterprises, Inc. is greater than zero.

8. That on or about the 7th day of May, 1979, Creekside Enterprises, Inc. had assets over and above its liabilities and the net worth of the corporation was greater than zero.

9. That R. L. Martin, Jr. has never contributed as much as \$12,000 to Creekside Enterprises, Inc. for any stock owned by R. L. Martin, Jr.

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10. That Larry G. Sanderford has never contributed as much as \$9,000 to Creekside Enterprises, Inc. for the purchase of stock in the name of Larry G. Sanderford.

11. That R. L. Martin, Jr. and Larry G. Sanderford have represented to the plaintiffs, Ada Pearl Stone and Cecil Glynn Jernigan, that the business known as "Players" had lost and was losing money and that the business known as "Players" and Creekside Enterprises, Inc. had no net assets.

. . . .

15. That the plaintiff, Ada Pearl Stone and the plaintiff, Cecil Glynn Jernigan, have requested, through their attorney, that R. L. Martin, Jr. and Larry G. Sanderford, as officers of Creekside Enterprises, Inc., bring an action against R. L. Martin, Jr. and Larry G. Sanderford for the recovery of money which they contend was converted by R. L. Martin, Jr. and Larry G. Sanderford.

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BARBARA BURNETT PAGE v. WILLIAM WENTING TAO

No. 8115SC629

(Filed 6 April 1982)

**1. Automobiles § 50— driving at unreasonably slow speed—evidence of negligence sufficient—entry of judgment n.o.v. improper**

In an action arising from an automobile accident, the trial judge erred in entering judgment n.o.v. for defendant since the evidence was sufficient to justify a verdict in plaintiff's favor. Defendant violated G.S. 20-141(h) when he drove on an interstate highway at a speed of between eight and ten miles per hour, failed to warn of his slow speed, and decided to remain on the interstate knowing he had car trouble.

**2. Automobiles § 88— contributory negligence— judgment n.o.v. properly denied**

The trial court properly denied defendant's motion for judgment n.o.v. on grounds plaintiff was contributorily negligent where the evidence tended to show that plaintiff was five or six car lengths behind a truck travelling at fifty-five miles per hour in the right hand lane of an interstate highway; that the day was clear and the road was dry; that she was followed by another tractor-trailer; that as the truck in front signaled to change lanes, so did plaintiff; that another truck was to her left; that when plaintiff looked in front of her, she was confronted for the first time with defendant's car which was mov-

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ing six to eight miles per hour in the lane ahead of her; and that thus "boxed in" she hit her brakes and skidded to the left into a tractor-trailer.

**3. Automobiles § 45.3— evidence concerning failure to stop automobile at scene of collision properly admitted**

Evidence that a defendant failed to stop his automobile after being involved in a collision is some evidence of negligence and was properly admitted.

**4. Automobiles § 45.2— evidence of minimum speed limit properly admitted**

The trial court properly denied defendant's conditional motion for a new trial on the ground that testimony as to the minimum posted speed or the minimum speed where posted was irrelevant and inadmissible since the trial court did not charge on the minimum speed statute, G.S. 20-141(c), there was evidence of defendant's slow speed that ranged from six miles per hour to forty miles per hour, and there was competent evidence of posted minimum and maximum speeds.

**5. Automobiles § 90— failure to instruct concerning plaintiff's duty to move in safety proper**

The trial court properly failed to instruct concerning the duty of a motorist to determine that a movement can be made in safety before turning from a direct line of travel where the evidence tended to show that plaintiff's movement entirely into the left lane of travel was involuntary in nature, prompted solely by her emergency braking, and caused by defendant's slow speed in plaintiff's lane of travel.

Judge HEDRICK concurring in part and dissenting in part.

APPEAL by plaintiff and defendant from *Brewer, Judge*. Judgment entered 23 January 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 February 1982.

On 19 December 1980, judgment was entered for plaintiff in accordance with a jury verdict awarding plaintiff damages for injuries she received in an automobile accident caused by defendant's negligence in operating his vehicle on a public highway at such a slow speed as to impede the normal and reasonable flow of traffic. Pursuant to G.S. § 1A-1, Rule 50(b), defendant, on 23 December 1980, filed his alternative motion for judgment notwithstanding the verdict or a new trial. On 23 January 1980 the trial court granted defendant's motion for judgment notwithstanding the verdict, saying it is

ORDERED (1) that the verdict and the judgment entered thereon be set aside and that judgment be entered for Defendant on the grounds that no evidence has been offered or received upon the trial tending to prove that Defendant was

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guilty of any negligence, said motion being denied on the grounds that Plaintiff was guilty of contributory negligence which was the sole cause of her injuries or at least a contributing proximate cause of her injuries as a matter of law; and it is further ORDERED (2) that in the event that judgment for Defendant to be entered herein is reversed on appeal, Defendant's alternative motion for a new trial be and the same is hereby denied on the grounds that no errors were committed at the trial as asserted in Defendant's motion for a new trial . . . .

From that portion of the judgment stating that there was no evidence that defendant was guilty of any negligence, plaintiff appealed. From that portion of the judgment stating that plaintiff was not contributorily negligent as a matter of law and denying defendant's alternative motion for a new trial, defendant appeals.

*Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Douglas Hargrave and Alonzo B. Coleman, for plaintiff appellant.*

*Newsom, Graham, Hedrick, Murray, Bryson & Kennon, by E. C. Bryson, Jr. and Lewis A. Cheek, for defendant appellee.*

BECTON, Judge.

I

FACTS

On 4 November 1977 plaintiff, who was travelling with her daughter in her Ford Pinto south towards Greensboro in the right hand lane of Interstate Highway 85 (I-85), was severely injured in an automobile accident. In the area where the accident occurred, the road was flat and level, the pavement was dry, the right lane had a twelve-foot wide asphalt shoulder, and a four to five-foot wide shoulder bordered the left lane. Prior to the accident, five vehicles were travelling south towards Greensboro in the following order: defendant's Toyota, Preston Hood's tractor-trailer, plaintiff's Pinto, William Baucom's tractor-trailer, and Ronald Staton's tractor-trailer. Defendant, driving the lead vehicle, was travelling about six to eight (6 - 8) miles per hour; the four vehicles approached defendant's Toyota travelling approximately fifty-five (55) miles per hour.

When Hood, driving the lead tractor-trailer, realized that defendant's Toyota "looked like it was almost stopped," he "whipped" his truck into the left-hand lane to avoid running into the rear of the Toyota. When plaintiff, whose view of the Toyota was blocked by Hood's truck and who was travelling five or six car lengths behind Hood's truck, saw Hood signal to pass, she took her foot from the accelerator and signaled to turn her car into the left-hand lane. Plaintiff then glanced to the left to see if she could change lanes, but she saw, for the first time, a tanker truck driven by William Baucom, which was passing her in the left lane. When plaintiff looked again ahead of her, Hood's truck had moved to the left. Plaintiff saw for the first time defendant's Toyota, which appeared to be stopped in her lane of traffic. Because the Baucom truck was even with her in the left lane and she could not move over, plaintiff hit her brakes attempting to avoid rear-ending the Toyota. She skidded left and was struck twice, first by the Baucom truck passing her and then by Staton's flat-bed truck which was following her.

Plaintiff, thrown from her car, slid across the pavement of I-85, and was seriously injured. Hood and Baucom, who saw the collision in their rear-view mirrors after passing the Toyota, pulled off the left side of the highway. When the Toyota, which was not involved in the collision, continued "chugging" down the road, Hood chased the Toyota on foot, beat on the window, and told defendant to wait until the police arrived. When Hood and Baucom walked toward the scene of the collision, the Toyota pulled away. Hood recorded the Toyota's license number and gave it to the investigating officer.

#### PLAINTIFF'S APPEAL

[1] Plaintiff captions her one and only argument as follows: "Plaintiff's evidence of defendant's negligence was sufficient to support the verdict, and therefore, the court erred in granting defendant's motion for judgment notwithstanding the verdict." We agree with plaintiff.

In ruling on a motion for judgment notwithstanding the verdict, the trial court must be guided by the same principles and standards applicable to motions for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 583-85, 201 S.E. 2d 897, 902-903 (1974); *Sum-*

*mey v. Cauthen*, 283 N.C. 640, 648, 197 S.E. 2d 549, --- (1973). The trial court must determine whether plaintiff has made out a prima facie case by presenting evidence sufficient to "justify a verdict in [plaintiff's] favor." *Cutts v. Casey*, 278 N.C. 390, 411, 180 S.E. 2d 297, 307 (1971). In passing upon the sufficiency of the evidence, the trial court's ultimate inquiry is whether the evidence would reasonably satisfy an impartial mind of the truth of the proposition sought to be proved. See *Moore v. Railroad*, 173 N.C. 311, 92 S.E. 1 (1917). The test used is so well known it needs no citation: All the evidence supporting the nonmovant's claim must be taken as true and considered in the light most favorable to the nonmovant; all contradictions, conflicts, and inconsistencies must be resolved in the nonmovant's favor; and the nonmovant must be given the benefit of every reasonable inference which may be legitimately drawn from the evidence.

Having set forth the standards applicable to the granting of a motion for judgment notwithstanding the verdict, we now set forth applicable principles of law, including the legal duties of motorists, and apply these principles to plaintiff's evidence of defendant's negligence.

A motorist must exercise proper care in the way and manner in which he operates his vehicle, proper care being that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. *Boykin v. Bisette*, 260 N.C. 295, 299, 132 S.E. 2d 616, 619 (1963). Separate and apart from this positive duty imposed by common law are specific statutorily imposed duties on motorists. One such statute applicable to this case is G.S. 20-141(h) which, in pertinent part, reads: "No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law . . . ." Violation of the standard of care imposed by G.S. 20-141(h) is negligence *per se*. See *Bridges v. Jackson*, 255 N.C. 333, 335, 121 S.E. 2d 542, 544 (1961).

Generally, when the evidence is in conflict or more than one conclusion can be drawn from the evidence, the case should be submitted to the jury. *Murray v. Murray*, 296 N.C. 405, 250 S.E. 2d 276 (1979); *Cutts v. Casey*; R. Byrd, *Proof of Negligence in North Carolina*, 48 N.C.L. Rev. 731, 752-53 (1970). Moreover, since



G.S. 20-141(h) does not fix a speed which makes its violation negligence as a matter of law, whether plaintiff's speed was unreasonably slow and whether traffic was impeded are questions of fact to be resolved by a jury.

Defendant strenuously argues that his conduct is excepted from our slow speed statute because of the testimony from Highway Patrolman J. G. George concerning the mechanical difficulty defendant had with his car. Patrolman George testified that he talked to defendant about the circumstances surrounding the accident:

I asked whether or not he was stopped in the interstate at the time of this accident. He told me that he was coming back from Raleigh, I believe. It was either Raleigh or Durham. He had been having car trouble and he was trying to get his car in. I remember asking how fast did he think he was going coming back. He said he was having trouble with the transmission. He said about 30 miles per hour to 40 miles per hour.

It is true that G.S. 20-141(h) allows a person to operate a motor vehicle at a slower than normal speed "when reduced speed is necessary for safe operation or in compliance with the law." Defendant's evidence that he was experiencing mechanical difficulty does not, as a matter of law, however, except him from coverage under the slow speed statute. As noted by plaintiff in her brief, defendant decided "to remain on the interstate, knowing he had car trouble [and] taking the awesome risk of causing a collision by his slow speed on a fast travelled thoroughfare" instead of pulling over onto the twelve-foot wide asphalt shoulder.

On the issue of defendant's negligence, whether measured by the duty imposed at common law to exercise reasonable care or the statutorily imposed duty not to violate G.S. 20-141(h), we believe that plaintiff has offered sufficient evidence to submit the case to the jury. Although defendant told Patrolman George he was travelling 30 to 40 m.p.h., plaintiff produced eyewitness testimony that defendant's Toyota was "barely moving," going 6-8 m.p.h." or "stopped." The eyewitnesses testified that they saw no hand signals, no lights, no emergency flashers, no smoke coming from the Toyota, and no warning of any kind to the overtaking traffic.

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Prior to and after the collision, the defendant continued to operate his Toyota at a slow speed on the interstate highway. Defendant made no move toward the 12-foot paved shoulder to his right until Hood chased the defendant's car down on foot, hit on his window, and motioned the defendant to pull off the road. When Hood turned to walk back to the scene of the collision, the defendant's car pulled back onto the Interstate and drove away at the same slow rate of speed.

The reasonableness of defendant's action was properly submitted to the jury. Three trucks and the plaintiff's Pinto travelled at a lawful and smooth flow of speed on an interstate highway. From this evidence the jury could clearly find that these travellers expected, on the interstate system, a rapid, smooth, and continuous flow of traffic. The jury was free to determine that the defendant's action in driving at five to ten (5 - 10) miles per hour on the interstate was negligence; that defendant's failure to warn of his slow speed was negligence; and that defendant's decision to remain on the interstate, knowing he had car trouble and taking the risk of causing a collision by his slow speed, was negligence.

The trial court erred in setting aside plaintiff's jury verdict and in granting defendant's motion for judgment notwithstanding the verdict.

DEFENDANT'S APPEAL

[2] Defendant first argues that the trial court erred in failing to grant his motion for judgment notwithstanding the verdict on the additional grounds that plaintiff was contributorily negligent and that her negligence was the sole proximate cause of her injuries as a matter of law. To support his argument, defendant contends that plaintiff was negligent (1) in driving too closely behind Hood's truck; (2) in failing to maintain proper control of her automobile; and (3) in failing to keep a proper lookout. We reject this argument.

It is true that "[c]onstant vigilance is an indispensable requisite for survival on today's highways. . . [and] that the reasonably prudent operator will not put himself unnecessarily in a position which will absolutely preclude him from coping with an emergency." *Beanblossom v. Thomas*, 266 N.C. 181, 187-88, 146

S.E. 2d 36, 41 (1966). Indeed, the space between two vehicles, taking into account such factors as locality, road and weather conditions, "should be sufficient to enable the operator of the car behind to avoid danger in case of a sudden stop or decrease in speed by the vehicle ahead under circumstances which should reasonably be anticipated by the following driver." *Id.* at 188, 146 S.E. 2d at 42. However, the distance need not be such as would permit the following driver to stop or avoid a collision "under any and all eventualities." *Id.*, 146 S.E. 2d at 42.

To direct a verdict on the grounds of plaintiff's contributory negligence, the evidence must be so clear that no other conclusion could reasonably be drawn. *Greene v. Meredith*, 264 N.C. 178, 184, 141 S.E. 2d 287, 292 (1965). We do not believe the evidence offered in this case meets that test. The plaintiff testified that she was five or six car lengths behind Hood's truck travelling at fifty-five (55) miles per hour in the right hand lane of I-85. The day was clear and the road was dry. She was followed by the tractor-trailer driven by Staton. As Hood's truck signalled to change lanes, so did plaintiff. However, Baucom's truck was to her left. When plaintiff again looked in front of her, she was confronted for the first time with defendant's car moving six to eight (6 - 8) miles per hour in the lane ahead of her. Thus "boxed in" she hit her brakes and skidded to the left. We think the judge correctly submitted the issue of contributory negligence to the jury. We find support in *Beanblossom* in which the plaintiff's car was struck head-on by a car that crossed the center line at approximately 2:00 a.m. one rainy morning. The plaintiff's car was struck again by a tractor-trailer that had been following either one car length behind, according to plaintiff's witness, or 85 - 150 feet behind, according to the testimony of the truck driver. Plaintiff's theory was that the truck driver had been following too closely. The *Beanblossom* Court said whether 85 - 150 feet was following too closely under the circumstances of the case was for the jury to say as the "sole judges of the facts." 266 N.C. at 189, 146 S.E. 2d at 42.

Defendant next argues that "the trial court erred in failing to conditionally grant his motion for a new trial. . . ." Defendant contends that the trial court committed the following prejudicial errors during the course of the trial: (a) admitted testimony concerning defendant leaving the scene of the accident; (b) admitted

general testimony concerning the minimum speed on interstate highways without requiring witnesses to testify specifically about the posted speed at the scene of the accident; (c) failed to instruct the jury on the duty of a driver to determine if a safe movement could be made before turning his vehicle from a direct line of traffic; (d) admitted testimony that plaintiff had a 20-25% disability of her arm, and restricted defendant's questioning of witnesses with regard to whether plaintiff was wearing a seat belt. Defendant has not persuaded us that he is entitled to a new trial.

[3] A. Prior to trial, defendant moved to exclude evidence that he continued driving south on I-85 after the accident; that two of the truck drivers, Baucom and Hood, ran to catch defendant's car, beat on the window and told defendant to stop and to wait for the police; that defendant then stopped momentarily before driving away; and that Hood recorded defendant's license plate number and gave it to the patrolman when he arrived. Defendant argues that the evidence which we have outlined above was irrelevant and highly prejudicial. The trial court denied the defendant's motion and further ordered

that witnesses in this proceeding will be permitted to testify to what they saw and heard but will not be permitted to testify to conclusions and will not be permitted to characterize the actions of the Defendant as running away or fleeing. Further, counsel for Plaintiff and Defendant are ordered not to speak in conclusory manner during the voir dire or opening statement regarding [Defendant] running away or fleeing.

The evidence indicates that defendant, as did the truck drivers, saw or should have seen the wreck immediately behind him, and that defendant, after having been informed of the accident by the truck drivers, and having reason to believe that his slow speed caused the wreck, left the scene of the accident, in the words of the plaintiff, "as fast as his puttering car could take him."

Evidence that a defendant failed to stop his automobile after having been involved in a collision is some evidence of negligence. *Edwards v. Cross*, 233 N.C. 354, 356, 64 S.E. 2d 6, 7 (1951). In the *Cross* case, the plaintiff was struck by an automobile and seriously injured. Circumstantial evidence suggested that defendant's

automobile struck the plaintiff. The defendant did not stop his automobile at the scene of the collision and was nervous when questioned about the occurrence. The *Cross* Court said that the defendant's "immediate flight from the scene of the injury . . . affords sufficient evidence of conscious wrong, or dereliction on his part, to warrant the jury in so concluding." *Id.* at 356, 64 S.E. 2d at 7. In this case, we believe the trial court followed the applicable principles of law and properly instructed the witnesses to testify about facts, not conclusions.

[4] B. On direct examination, Patrolman George testified, over objection, that the minimum speed on an interstate highway, where posted, is forty (40) miles per hour. Patrolman George did not testify about a posted minimum speed on I-85 and, consequently, did not indicate where a sign indicating a minimum speed was located in relation to the scene of the accident. William Baucom, one of the truck drivers, was allowed to testify, over objection, that the posted minimum speed limit on I-85 is forty (40) miles per hour.

G.S. 20-141(c), which sets a minimum speed restriction of forty (40) miles per hour in a speed zone of fifty-five (55) miles per hour upon the interstate highway system, states that "[t]hese minimum speeds shall be effective only when appropriate signs are posted indicating a minimum speed." Consequently, defendant argues that since there is no evidence of a posted sign anywhere near the accident, the opinion testimony as to the minimum posted speed or the minimum speed where posted is irrelevant and inadmissible. In support of its contention, the defendant cites *Hensley v. Wallen*, 257 N.C. 675, 127 S.E. 2d 277 (1962). We believe *Hensley* is distinguishable, and we reject defendant's contention.

In *Hensley*, the jury was concerned with whether the collision occurred in a business, residential, or unposted speed district. In the case at bar, the collision clearly occurred on an interstate highway. In *Hensley*, the trial court on three separate occasions referred to a "posted" speed even though plaintiff never testified about a posted speed, and the trial court further instructed the jury on driving in excess of the posted speed limit as a grounds for negligence. The court in the case *sub judice* did not refer to any minimum speed, posted or otherwise, in his instructions to the jury.

In addition to finding *Hensley* distinguishable, we find no prejudicial error in the trial court's decision to admit the testimony to which defendant objected in this case. First, assuming that the question to Patrolman George, "And what is the minimum speed on an interstate highway?" was technically improperly phrased, the defect in the question was cured when Baucom later testified that the posted minimum speed on I-85 was forty (40) miles per hour. Viewing Baucom's direct and cross examination testimony in context, we find that his testimony concerning the posted minimum speed relates to the area of the accident. Second, defendant's admission to Patrolman George that he was travelling at approximately thirty (30) miles per hour to forty (40) miles per hour because of mechanical difficulty as he travelled from Raleigh to Greensboro, lends credence to our contextual reading of the record. Since the trial court did not charge on the minimum speed statute, since there was evidence of defendant's slow speed that ranged from six (6) miles per hour to forty (40) miles per hour, and since there was competent evidence of posted minimum and maximum speeds, the trial court properly denied defendant's conditional motion for a new trial on this assignment of error.

[5] C. The defendant contends that the following testimony of Ronald Staton, the third truck driver, provides sufficient evidence to justify an instruction on the duty of a motorist to determine that a movement can be made in safety before turning from a direct line of travel and that the trial court erred in failing to so instruct:

I could see what the Pinto did after the truck in front of it pulled over to the left-hand lane. After the tractor in front of the Pinto pulled over, the Pinto noticed what was happening. I guess she had no CB or something. She noticed that the tractor was moving over to avoid this slow moving car. So she started moving, she noticed another tractor that had pulled over beside her in the left-hand lane. She hadn't noticed that tractor. When she started to pull over and noticed the truck there, by then she was at the tail end of the other tractor-trailer truck. She had to swerve back in and she was still gaining up on the slow moving car. So she grabbed her brakes and started back into the left-hand lane again to try to cut in between me and the truck. I guess she was trying to

find any way out there at the time. I was braking my speed as fast as I could and getting over as far as I could, but I couldn't hit the dirt not being loaded and then the mush. It hit the mushy median strip and that's when the collision happened.

The Pinto hit my truck. I thought I saw the car hit the second truck, the truck that was passing. I thought I saw it hit it, but they say it didn't. The way I saw it, the Pinto hit the back tires of the truck that was passing. She swerved back in when the tires put her in a little of a spin. She had her brakes locked. Then she tried to cut back over again to avoid the Toyota and she just cut in right in front of my right-hand wheel. There was nowhere for me to go except for my front end to try to go over her front end.

. . . .

After truck number 1 got out into the left-hand lane the Pinto started out into the left-hand lane too. It did not make a movement right behind truck number 1. It sort of waited to find out why the truck moved over before it moved over. But after truck number 1 got over into the left-hand lane, the Pinto sat back there for awhile, I guess to find out why he had moved over. When she saw what was happening she started to move over. At that point, the truck that had passed me was up passing her. Her car was around by the back tandem on his trailer, when she started over. I was already over in the left-hand lane. I hit my brakes then. I don't know whether she hit her tires or not. It looked like she might have, but I don't know whether she did or not. It looked like she hit the tires the first time she started into the left-hand lane. Then she came back into the right-hand lane and she was in a swerve then. She had her brakes or something had locked because she started to skid. She was in a swerve and then she took it back into the left-hand lane again and that is when she hit me.

Two things seem readily apparent from Staton's testimony: (1) Plaintiff started moving to the left when "she saw what was happening," but moved back to the right when she became aware of a truck that was passing her; and (2) that plaintiff's second

movement left and first movement entirely into the left hand lane was involuntary in nature, prompted solely by her emergency braking, caused by defendant's slow speed in plaintiff's lane of travel. On these facts, the trial court's refusal to give the requested instruction was not error.

D. Finally, defendant contends that two of the trial court's evidentiary rulings contributed to the \$50,000.00 jury award, which defendant contends is excessive. First, over objection, plaintiff's doctor was allowed to testify that plaintiff had a 20%-25% disability of the arm. Defendant's sole argument is that the opinion testimony of the medical expert should be in terms of permanent physical impairment rather than in terms of a disability. We summarily reject this argument.

Second, defendant contends the trial court committed error by not allowing defendant to do more than question witnesses and introduce evidence regarding whether the plaintiff wore a seat belt at the time of the accident. In *Miller v. Miller*, 273 N.C. 228, 160 S.E. 2d 65 (1968), our Supreme Court said the failure to wear a seat belt does not constitute negligence *per se*. We summarily reject this argument.

On defendant's appeal, we find no error.

On plaintiff's appeal, we reverse the trial court's order granting defendant's motion for judgment notwithstanding the verdict and remand this case for entry of judgment on plaintiff's jury verdict against defendant.

Affirmed in part and reversed in part.

Judge HILL concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK concurring in part and dissenting in part.

I agree with the majority that the trial court erred in entering a judgment for the defendant notwithstanding the verdict; however, I also believe the trial court erred in not instructing the jury on the duty of a driver to determine if a safe movement could be made before turning his vehicle from a direct line of traf-



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fic. G.S. § 20-154(a). The evidence, in my opinion, clearly requires such an instruction. While the evidence tends to show that defendant's negligence was one of the proximate causes of the collision, the evidence also tends to show that plaintiff's failure to see that her turn to the left could be done in safety was also a proximate cause of the collision.

I vote to remand the case to the superior court for a new trial on all issues.

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STATE OF NORTH CAROLINA v. CHARLES L. LOYE

No. 8118SC881

(Filed 6 April 1982)

**Constitutional Law § 48— conflict of interest between defendant and attorney— ineffective assistance of counsel**

Defendant's constitutional right to the effective assistance of counsel was denied because of a conflict of interest between defendant and one of his two privately retained attorneys where the attorney knew that he was under investigation for his own participation in criminal conduct involving defendant, and defendant's plea of guilty to armed robbery was thus not knowingly and voluntarily made. G.S. 15A-1420, G.S. 15A-1442(5) and G.S. 15A-1443(b).

Judge MARTIN (Robert M.) dissenting.

WRIT of certiorari granted to defendant from *Seay, Judge*. Judgment denying defendant's motion for appropriate relief entered 12 September 1979 in GUILFORD County Superior Court. Heard in the Court of Appeals 2 February 1982.

Defendant was indicted on an armed robbery charge stemming from a 28 August 1974 robbery of a Bestway Supermarket. Defendant pleaded not guilty, and was brought to trial, represented by privately retained counsel Richard Dailey and Arthur Vann. After damaging testimony was given by an accomplice to the armed robbery, defendant's attorneys advised defendant to enter a guilty plea, which he did. Defendant was sentenced to 28 to 30 years imprisonment, the maximum punishment for armed robbery being 30 years. Shortly after defendant was sentenced, defendant's attorney Richard Dailey was indicted for felonious receiving of stolen goods, a crime which also involved defendant.

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In his application of post-conviction relief, defendant alleged that Dailey knew that the State was seeking defendant's testimony against Dailey, but that Dailey did not advise defendant, attorney Vann or the court of the conflict of interest inherent in these circumstances. On defendant's motion for appropriate relief, Judge Seay made findings of fact and entered a conclusion of law that no conflict of interest existed between defendant and his counsel, Richard Dailey, that attorney Vann's ignorance of the situation did not deprive defendant of effective assistance of counsel, and that defendant was accorded due process of law in the entire disposition of his case. Subsequent to Judge Seay's denial of relief, this Court allowed defendant's petition for a writ of certiorari.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Reginald L. Watkins, for the State.*

*Adam Stein, Appellate Defender, by Malcolm R. Hunter, Jr. and Lorinzo Joyner, Assistant Appellate Defenders, for defendant-appellant.*

WELLS, Judge.

Defendant contends that his constitutional right to effective assistance of counsel was denied because of the undisclosed conflict of interest existing between defendant and one of his attorneys, Richard Dailey. We agree, and award defendant a new trial.

A defendant is entitled to collaterally attack a judgment entered on his guilty plea, on the grounds that it was not voluntarily and knowingly given. *Blackledge v. Allison*, 431 U.S. 63, 52 L.Ed. 2d 136, 97 S.Ct. 1621 (1977); G.S. 15A-1420(c); *State v. Roberts*, 41 N.C. App. 187, 254 S.E. 2d 216 (1979). Where defendant alleges that ineffective assistance of counsel caused him to enter his guilty plea, an issue of constitutional rights arises, and the fact that defendant signed an agreement form does not bar his right to seek post-conviction relief. See *State v. Roberts*, supra, G.S. 15A-1420; G.S. 15A-1442(5); G.S. 15A-1443(b).

This case raises a question of conflict of interest rendering Dailey's representation of defendant ineffective; thus, cases discussing competency of representation are not apposite. See

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*State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), and cases cited therein. Although we are not aware of previous decisions involving a conflict such as the one under review here, several Supreme Court cases involving claims of ineffective assistance of counsel in the context of an attorney's multiple representation of co-defendants are instructive.

In *Glasser v. U.S.*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942), the Supreme Court reversed a defendant's conviction for conspiracy where defendant's attorney also represented a co-defendant, and the court was aware of a conflict, but refused to appoint another attorney. Defendant Glasser was able to show prejudice, in that his attorney was prevented from seeking to exclude incompetent evidence and from conducting more effective cross-examinations because of his dual representation. The Court stated, however:

To determine the precise degree of prejudice sustained by Glasser . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

315 U.S. at 75, 76.

*Holloway v. Arkansas*, 435 U.S. 475, 55 L.Ed. 2d 426, 98 S.Ct. 1173 (1978) also involved multiple representation of co-defendants by one attorney in a single trial. As in *Glasser*, defendant Holloway's attorney was court-appointed, and the court knew of a conflict but refused to remedy it. With regard to the need of a defendant to show how he was specifically prejudiced by his counsel's conflicting interest, the Court stated:

But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would [435 US 491] be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the

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impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

In *Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed. 2d 333, 100 S.Ct. 1708 (1980) the Court reviewed *Glasser* and *Holloway*, stating:

Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 US, at 76, 86 L Ed 680, 62 S Ct 457. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice [446 US 350] in order to obtain relief. See *Holloway*, supra, at 487-491, 55 L Ed 2d 426, 98 S Ct 1173. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See *Glasser*, supra, at 72-75, 86 L Ed 680, 62 S Ct 457.

We hold that defendant's showing that Dailey was under investigation for his own participation in criminal conduct involving defendant, accompanied by Dailey's knowledge of these circumstances, established a conflict of interest between Dailey and defendant. It is therefore unnecessary for us to speculate as to whether or how much defendant may have been prejudiced by such a conflict. Prejudice in these circumstances must be conclusively presumed.

We hold that because defendant was denied effective assistance of counsel, his plea of guilty was not knowingly and voluntarily made. See *Blackledge*, supra, *Roberts*, supra. Defendant is therefore entitled to a

New trial.

Judge WEBB concurs.

Judge MARTIN (Robert M.) dissents.

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Judge MARTIN (Robert M.), dissenting.

The majority holds that because Petitioner was denied effective assistance of counsel his plea was not knowingly and voluntarily made and therefore he is entitled to a new trial. In my disagreement with this holding, I find it helpful to review the record in some depth which includes the trial transcript of the testimony of Allen Odell Smith.

Petitioner was charged by indictment in proper form with armed robbery. At the 1 December 1975 Session of Superior Court, Guilford County, the petitioner, Charles Loye, was brought to trial. He entered a plea of not guilty. The evidence showed that in gang-like style, the petitioner Loye and his confederates, with the use of a pistol and sawed-off shotgun, robbed Mr. Carlton P. Collins of \$4,010.00.

Petitioner privately retained two experienced attorneys, Mr. Richard M. Dailey, Jr. and Mr. Arthur Vann, to represent him at his trial and they were heard at every stage of the proceedings. Both attorneys interposed numerous objections to the State's evidence. Mr. Arthur Vann, a lawyer of unquestioned competence, conducted a rigorous and rigid cross examination of the State's principal witness which consumed thirty-eight (38) pages of the record.

After two and one-half days of trial, the petitioner Loye entered a negotiated plea of guilty of armed robbery and by the terms of which the State dismissed eleven (11) felony cases pending against him, including conspiracy to commit murder against some of the State's witnesses.

The record contains the following pertinent excerpts taken from the transcript of plea filed December 4, 1975.

3. Have you had time to talk about your case with your lawyer and are you satisfied with his services? Answer Yes

5. Do you understand that you are charged with the (felony) (~~misdemeanor~~) of Armed Robbery-that is Robbery w/a Firearm? Answer Yes

6. Do you understand the nature of this charge? Answer Yes

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7. Do you understand that upon your plea of (guilty) (~~no contest~~) you could be imprisoned for a maximum of thirty (~~months~~) (years) including consecutive sentences, and a mandatory minimum sentence, if applicable, of five (~~months~~) (years)? Answer Yes

8. Do you understand that you have the right to plead not guilty and be tried by a jury and be confronted by the witnesses against you, and that by your pleading (guilty) (~~no contest~~) you give up these and other constitutional rights? Answer Yes

9. I now inquire of the prosecutor and of the defendant and his counsel whether or not there have been any prior plea discussions. Before you answer, I advise you that the courts have approved plea bargaining and have said that it is an important part of the administration of justice to be encouraged. You should, therefore, advise me truthfully of any plea arrangements without the slightest fear of incurring disapproval of the court. Now therefore, have you agreed to plead (guilty) (no contest) upon terms of a plea arrangement? Answer Yes

10. Are these the terms and all of them? That the State dismiss the following cases 75CR20435, 75CR20440, 75CR20493, 75CR20432, 75CR20439, 75CR20416, 75CR20404, 75CR20413, 75CR20405, 75CR20399, 75CR90052; that prayer for judgment be continued until Feb. 16, 1976 and that the defendant remain in custody until that date or until final judgment is entered herein? Answer Yes

11. Except for the terms set out above, if any, has anyone made any promises to you or threatened you in any way to cause you to plead (guilty) (no contest)? Answer No

12. How do you plead to the charges? Answer Guilty

13. (a) Are you in fact guilty? (Omit if plea is no contest) Answer Yes

14. Do you plead (guilty) (~~no contest~~) of your own free will, understanding what you are doing? Answer Yes

15. Do you have any questions about what I have just said to you? Answer No

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I am 35 years of age and completed the 12th grade of school.

I have read or have heard read all of these questions and answers and understand them. The answers shown are the ones I gave in open court and they are true and accurate. The conditions of the plea of (guilty) (no contest) as stated on the reverse hereof are accurate.

Date Dec. 4, 1975

s / CHARLES L. LOYE  
Defendant

(Sworn to this 4 day of Dec., 1975)

s / CHARLOTTE HICKS, Dep.  
Clerk of Superior Court

As attorney for the defendant, Charles L. Loye, I hereby certify that the conditions stated on the reverse hereof, if any, upon which the defendant's plea of (guilty) (~~no contest~~) was entered are correct and they are agreed to by the defendant and myself as his attorney upon which the defendant's plea of (guilty) (~~no contest~~) was entered.

s / ARTHUR VANN  
s / RICHARD M. DAILEY, JR.  
Attorney for Defendant

Date Dec. 4, 1975

As Asst. prosecutor for the 18th Judicial District I hereby certify that the conditions stated on the reverse hereof, if any, are the terms agreed to by the defendant and his counsel and myself for the entry of the plea of (guilty) (no contest) by the defendant to the charge in this case.

Date 12-4-75

s / JOSEPH R. JOHN  
Asst. Prosecutor

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PLEA ADJUDICATION (Filed Dec. 4, 1975)

The undersigned Presiding Judge upon examination of the record proper and hearing statement of counsel for the defendant and the prosecutor, and upon considering the evidence offered, makes the following findings:

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1. That the terms, if any, of the plea of (guilty) (~~no-contest~~) are accepted by the Court.

2. That there is a factual basis for the entry of the plea.

3. That the plea of (guilty) (~~no-contest~~) was the result of an informed choice by the defendant and is made freely, voluntarily, and with full knowledge of the consequences.

Upon the foregoing findings, the defendant's plea of (guilty) (~~no-contest~~) is hereby accepted by the Court and ordered recorded.

This the 4 day of December, 1975.

s / GEORGE M. FOUNTAIN  
Presiding Judge

JUDGMENT AND COMMITMENT—75CR20358

In open court, the defendant appeared for trial upon the charge or charges of Robbery with a firearm and thereupon entered a plea of Not Guilty. During the state's evidence the defendant withdrew his plea of not guilty and entered a plea of guilty as charged on December 4, 1975 and prayer for judgment having been continued until February 16, 1976.

Having pled guilty of the offense of Robbery with a firearm which is a violation of G.S. 14-87 and of the grade of Felony

It is ADJUDGED that the defendant be imprisoned for the term of not less than twenty-eight (28) nor more than thirty (30) years in the State Department of Correction. The defendant is to be given credit for 105 days spent in custody awaiting trial.

It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.



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This 19 day of February, 1976.

s / THOMAS W. SEAY, JR.  
Presiding Judge

Attorney for Defendant: Art Vann, Richard Dailey,  
E. L. Alston, Jr.

Attorney for the State: Joseph John

Date certified copies of judgment delivered to Sheriff for  
commitment: 2-20-76

The following are pertinent excerpts taken from the judgment on motion for appropriate relief filed September 11, 1979:

Plenary hearing was held on the 19th day of July, 1979. The petitioner was present and was represented by Thomas F. Loflin, III. The State of North Carolina was represented by James Coman, Charles Wannamaker, III, and Howard R. Greeson, Assistant District Attorneys.

The trial complained of was held in the Superior Court of Guilford County with judgment entered on the 4th day of December, 1975, when the petitioner withdrew his plea of not guilty following the impanelling of a jury and did enter a plea of guilty to the charge of robbery with a firearm, which plea was accepted by the Presiding Judge George M. Fountain, who thereafter continued sentencing until February 19, 1976; that at the said sentencing hearing which was conducted before Judge Thomas W. Seay, Jr., the petitioner herein was sentenced to be imprisoned for a term of not less than twenty-eight years nor more than thirty years in the North Carolina Department of Correction.

The Court finds that the petitioner has alleged and contends that his constitutional or legal rights were denied or violated during his original trial in December of 1975 in each of the following respects:

3. That the petitioner was deprived of his right to effective assistance of counsel in that one of his trial attorneys, Richard Dailey, had a material conflict in representing the petitioner in that said Dailey was later indicted and convicted of feloniously receiving stolen property from the Petitioner Loye.

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4. That the petitioner was deprived of his right to effective representation and assistance of counsel in that petitioner's attorney, Arthur Vann, was unaware of Attorney Richard Dailey's involvement in feloniously receiving stolen property from the petitioner and unaware that a conflict of interest existed between Attorney Dailey and petitioner and was thus prevented from adequately representing petitioner.

That the Court heard the evidence of the petitioner, the arguments of the attorney for the petitioner, evidence for the State and argument of the District Attorney, and each side stated that it had no further evidence to present.

From a consideration of all the competent evidence offered and after considering the arguments of counsel, the Court finds that:

1. In case bearing Docket No. 75CR20358, the petitioner, Charles Loye, withdrew his plea of not guilty after a jury had been impanelled and some evidence presented and moved the Court that he be allowed to plead guilty to robbery with a firearm which was accepted on the 4th day of December, 1975, by Judge George Fountain, presiding in the Superior Court of Guilford County, said plea being upon a true bill of indictment returned at the November 10, 1975, Session by the Grand Jury, which said bill charged the felony of robbery with a firearm.

2. That this sentence imposed on February 19, 1976, at the sentencing hearing was a term of imprisonment of not less than twenty-eight years nor more than thirty years.

3. That prior to the petitioner's trial in December of 1975, the following attorneys were privately employed to represent the petitioner at his said trials and did so serve: Arthur Vann and Richard Dailey.

4. That the undersigned Judge of the Superior Court has seen and observed the witnesses testifying on the stand and has determined what weight and credibility to give their testimony.

5. That petitioner's plea of guilty to the offense of robbery with a firearm and the judgment imposed thereon was

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pursuant to and a part of a negotiated plea which involved a great number of cases and disposed of a great number of cases and at the sentencing hearing, the petitioner herein did enter his plea knowingly and of his own free will after having been advised of his rights as provided by law and after being advised at length of the terms of the negotiated plea of guilty.

Based upon the foregoing findings of fact, the Court concludes and finds as a matter of law that:

3. That the sentencing Judge and this Court finds, determines and concludes that petitioner's plea of guilty to the felony of armed robbery was freely, understandingly, and voluntarily made and that the petitioner did state under oath that he was in fact guilty of the offense of robbery with a firearm and that the said plea was a part of a plea bargain which provided that the State would dismiss eleven pending cases against the petitioner.

4. That the sentence imposed was not excessive, cruel, or unusual and was within the statutory limits and that the petitioner was represented by competent counsel, Arthur Vann and Richard Dailey, who afforded him effective representation throughout all of the proceedings against the petitioner.

6. It is herein found and concluded that there is no evidence which is believable to establish any conflict of interest existing between the petitioner and his attorney, Richard Dailey; the records and the evidence presented establish that petitioner was competently represented by all of his attorneys at his December, 1975, trial and entry of the plea and the sentencing hearing, and that there is no evidence that could be believed that any criminal relationship existing between petitioner and his attorney, Richard Dailey, in any manner deprived petitioner of his right to effective assistance of counsel. To the contrary it is evidence and the Court finds as a fact and concludes that petitioner was represented by Arthur Vann at his trial and sentencing hearing and that the said Arthur Vann is an experienced and widely known and respected criminal defense lawyer.

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7. The Court finds and concludes that the fact that Attorney Arthur Vann was not aware of the alleged criminal relationship between the petitioner and Richard Dailey and that it in no way affected the quality of the representation rendered for the petitioner at his said trial and sentencing and did not deprive petitioner of being represented by competent counsel.

9. That the Court finds and concludes that the petitioner was not deprived of due process of law in his right to confront and examine the witness Smith in that the Court specifically finds that petitioner and his counsel were advised of the plea arrangements with the witness Smith as they existed at the time of the testimony of said witness Smith.

10. The Court finds and determines and concludes that there is no evidence that can be believed that petitioner withdrew his plea of not guilty and tendered a plea of guilty for the reason that the witness Smith did not testify truthfully at the December trial concerning his plea arrangement and treatment upon incarceration; this Court specifically finding that there was a factual basis for the plea of guilty by the petitioner, said factual basis being supported by the evidence at petitioner's December trial and petitioner's transcript of plea; and that there is no evidence to support any alleged violation of petitioner's constitutional rights by reason of his alleged criminal enterprise with Richard Dailey, his attorney; and the Court specifically finds that there is no evidence that can be believed that the State of North Carolina elicited testimony from the witness Smith that was a deliberate falsehood known to the State of North Carolina but not known to the petitioner or his trial counsel to be false concerning the petitioner's sentence that could be imposed upon the witness Smith's sentencing for his crimes, specifically that of the offense of armed robbery.

11. That the petition of the petitioner seeking to have his plea of guilty to the offense of robbery with a firearm vacated and to be allowed to plead anew and to seek and be granted a new trial should be and is herein denied and dismissed.

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**State v. Loye**

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NOW, THEREFORE, IT IS ORDERED:

1. That the petitioner, Charles Loye, had a fair and impartial trial and none of his constitutional or legal rights were denied or violated in any respect before, during, and after his trial in December of 1975, nor at his sentencing hearing on February 19, 1976.

2. That the petition and the motion of the petitioner for his release and to vacate his plea of guilty to robbery and to be allowed to plead anew and for a new trial are hereby denied and dismissed.

3. That the judgment and sentence of the Court entered in this case is legal, valid and proper and was entered in full compliance with due process of law.

This the 12 day of September, 1979.

s / THOMAS W. SEAY, JR.  
JUDGE PRESIDING

*Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L.Ed. 2d 333, 346-347, 100 S.Ct. 1708 (1980), cited by petitioner, involves an issue of conflict of interest arising from the multiple representation of co-defendants. Significantly, the court rejects the argument that the possibility of conflict is sufficient to impugn a criminal conviction. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."

N.C.G.S. § 15A-1420(c)(5) provides: "If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." *State v. Dickens*, 299 N.C. 76, 261 S.E. 2d 183 (1980).

Neither the United States Supreme Court, nor this Court, has fashioned a rule to guide us in determining whether an accused was denied his Constitutional right to effective assistance of counsel due to counsel's . . . conflicting loyalties. . . .

*State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974).

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[E]ach case must be approached upon an *ad hoc* basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel.

*Id.* at 613, 201 S.E. 2d 872.

[T]he incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice.

*Id.* at 612, 201 S.E. 2d 871.

Petitioner testified at the hearing as follows:

I recall going on trial during the week of the first of December 1975 in connection with an alleged armed robbery of the Bestway Supermarket located on High Point Road in this county. At that time there were several co-defendants on trial with me. At the trial proper I was represented by Mr. Arthur Vann and Mr. Richard Dailey. During the course of that trial I changed my plea from not guilty to guilty. This was after several witnesses had testified. Charlie Smith was the first witness and I think the owner of the grocery store testified and one of his cashiers or assistants. I changed my plea after consulting with my two lawyers, Mr. Dailey and Mr. Art Vann.

. . .

My position with Mr. Vann was that I wanted to plead not guilty and fight the case out. I changed my mind and pled guilty basically because of Mr. Smith's testimony.

. . .

After listening to Smith's testimony it was my opinion that the jury would convict me if I persisted in my not guilty plea.

In the instant case petitioner was represented throughout the proceedings by Mr. Vann, an able attorney with a long and successful practice in the trial of criminal as well as civil cases.

The courts have consistently required a stringent standard of proof on the question of whether an accused has been denied con-

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State v. Barnes

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stitutionally effective representation. The petitioner has failed to carry the burden of proof placed upon him by virtue of N.C.G.S. § 15A-1420(c)(5).

The record wholly fails to reveal that petitioner has been deprived of any right guaranteed by the Federal or State Constitutions, and I am of the opinion that the judgment should be affirmed.

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STATE OF NORTH CAROLINA v. JOE LEE BARNES

No. 814SC965

(Filed 6 April 1982)

**1. Rape and Allied Offenses § 6— second degree rape—requirement of vaginal intercourse—instruction on “sexual intercourse”**

The trial court's instruction requiring a finding that defendant had “sexual intercourse” with the prosecutrix was a sufficient charge on the “vaginal intercourse” element of second degree rape where the State's evidence pertained only to the defendant having committed vaginal intercourse with the prosecutrix and not to any other form of copulative sexual intercourse, since the court's instruction could not have misled the jury into thinking it could convict defendant of second degree rape for having committed a form of sexual intercourse other than vaginal intercourse. G.S. 14-27.3(a).

**2. Rape and Allied Offenses § 6.1— second degree rape—failure to submit lesser offense of assault**

The trial court in a prosecution for second degree rape did not err in failing to submit to the jury an issue as to the lesser included offense of assault where the State's evidence tended to show the essential elements of second degree rape, and where defendant presented evidence that he committed common law robbery, which includes violence or putting in fear, and that he did not have sexual relations with the prosecutrix, but he did not present evidence from which the jury could reasonably find him also guilty of assault.

Judge BECTON dissenting.

APPEAL by defendant from *Barefoot*, Judge. Judgment entered 20 May 1981 in Superior Court, DUPLIN County. Heard in the Court of Appeals on 11 February 1982.

Defendant was charged in proper bills of indictment with second-degree rape, common law robbery, and assault with a deadly weapon with intent to kill. Defendant tendered pleas of

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guilty to common law robbery, and not guilty to second-degree rape and assault with a deadly weapon with intent to kill. Upon a trial by jury, defendant was found guilty of second-degree rape and not guilty of assault with intent to kill and of assault with a deadly weapon with intent to kill. From a judgment imposing a prison sentence of not more than 40 nor less than 30 years, defendant appealed.

*Attorney General Rufus L. Edmisten, by Associate Attorney Wilson Hayman, for the State.*

*Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr. and Lorinzo L. Joyner, for defendant appellant.*

HEDRICK, Judge.

[1] By his first assignment of error, defendant argues, "The trial court committed reversible error by failing to instruct the jury that in order to convict the defendant of second degree rape it must find beyond a reasonable doubt that the defendant penetrated Ms. Newkirk's sex organ with his sex organ." Defendant contends that the court's instructions inadequately covered one element of second-degree rape, in that they stated merely that "the State must prove . . . that the defendant had sexual intercourse with Anna Newkirk."

"The judge must charge the essential elements of the offense." *State v. Hairr*, 244 N.C. 506, 509, 94 S.E. 2d 472, 474 (1956). The statutory definition of second-degree rape lists "vaginal intercourse" as an essential element of the offense. G.S. § 14-27.3(a). The question, therefore, is whether the court's instruction requiring a finding that defendant committed "sexual intercourse" was a sufficient charge on the "vaginal intercourse" element of second-degree rape. Although there is always sexual intercourse when there is vaginal intercourse, *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3204 (1976), there are instances in which there may be sexual intercourse in a form other than vaginal intercourse. Hence, strictly speaking, the jury in the present case, following the court's instruction, could have found the defendant guilty of second-degree rape by finding that he



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engaged in a form of copulative sexual intercourse other than the requisite vaginal intercourse. A charge to the jury, however,

will be construed contextually as a whole, and when, so construed, it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained, even though the instruction might have been more aptly given in different form.

*State v. Davis*, 290 N.C. 511, 544-45, 227 S.E. 2d 97, 117 (1976). "The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred." *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E. 2d 476, 479 (1971).

At trial in the present case, the State's evidence pertained only to the defendant having committed vaginal intercourse with Ms. Newkirk, and not at all to any other form of copulative sexual intercourse. The State presented evidence tending to show that defendant "ravished" Anna Newkirk on 28 March 1981, that she was later examined by a physician on the same day of her confrontation with defendant and was found to have had a penetration of her vagina, and that on 28 March 1981 Ms. Newkirk told the Rose Hill Chief of Police that defendant raped her. Within the context of the trial, the court's instructions requiring a finding of "sexual intercourse" could not reasonably be believed to have misled the jury into thinking it could convict defendant of second-degree rape for having committed a form of sexual intercourse other than vaginal intercourse. Furthermore, "the law [does] not require that any particular words be used when stating the elements of the offense," *State v. Thacker*, 301 N.C. 348, 356, 271 S.E. 2d 252, 257 (1980), and "the term 'sexual intercourse' encompasses actual penetration" of the female sexual organ by the male sexual organ. *State v. Vinson*, *supra* at 342, 215 S.E. 2d at 71. We hold the instructions challenged by defendant sufficiently related the law of second-degree rape to the evidence presented, and this assignment of error is overruled.

[2] Defendant's next assignment of error is "[t]he trial court's failure to submit the offense of assault as a lesser included offense of second degree rape."

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Where it is permissible under the bill of indictment to convict the accused of a lesser degree of the crime charged, *and there is evidence to support a milder verdict*, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. . . . Unless there is evidence of guilt of the lesser degree, however, the court should not submit it. . . . If all the evidence tends to show that the crime charged in the bill of indictment was committed, and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on the unsupported lesser degree and correctly refuses to submit lesser degrees of the crime charged as permissible verdicts.

*State v. Allen*, 297 N.C. 429, 434, 255 S.E. 2d 362, 365 (1979) [Emphasis in original]. The mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice to require submission to the jury of a lesser degree. *State v. Capel*, 21 N.C. App. 311, 204 S.E. 2d 226, *cert. denied*, 285 N.C. 592, 205 S.E. 2d 724 (1974).

When, upon all the evidence, the jury could reasonably find the defendant committed the offense charged in the indictment, but could not reasonably find that (1) he did not commit the offense charged in the indictment and (2) he did commit a lesser offense included therein, it is not error to restrict the jury to a verdict of guilty of the offense charged in the indictment or a verdict of not guilty, thus withholding from their consideration a verdict of guilty of a lesser included offense.

*State v. Lampkins*, 286 N.C. 497, 504, 212 S.E. 2d 106, 110 (1975), *cert. denied*, 428 U.S. 909, 49 L.Ed. 2d 1216, 96 S.Ct. 3220 (1976). Further,

[w]here all of the evidence tends to show that the offense committed, if any, was that charged in the bill of indictment, and there is no evidence tending to show the commission of a lesser, included offense, except insofar as it is a necessary element of the offense charged, the court is not required to submit for the jury's consideration the possibility of a verdict of guilty of such lesser, included offense, or to instruct the jury concerning such lesser offense.

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*State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971).

Assault against the person is a lesser included offense of rape. *State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958). In the present case, however, the State presented evidence tending to show that defendant jumped on Anna Newkirk, covered her face with a pillow, and "ravished" her. This evidence constitutes uncontradicted evidence of the essential elements of second-degree rape. Defendant, on the other hand, testified as follows:

The money was fixed in a little black bag, but the little black bag was unzipped. Seem like it was just sitting there for me and I seen the money and I snatched the money.

It was just in a stack—two big stacks and I couldn't believe it. I stuck my hand and peeled it back to see was it counterfeit or not. Just pulled it back. I said, "This is real money" to myself. It was \$20 bills. There were a couple of rubber bands. It was two stacks of \$20 bills.

As I went to get the money, I snatched the money and I cuff-ed it down. She really didn't see this, and all at once seems like when I got ready to get the last stack to put it up underneath my pants, she started to holler and I seen the pillow—the pillow was right there beside me and I snatched the pillow and done one of the numbers just like that, and I got nervous and I throwed the pillow down just like that right in her face and took off. Only thing I could hear was, "Bring me my money back you strumpet" just like that and I left her in the house . . . .

. . . .

I did not have any kind of sexual relations with Anna Newkirk. . . . I have pled guilty to robbery. I did not make any effort to choke Anna Newkirk. I put the pillow over her face in order for me to get the money and get out. I didn't even get that close to her to choke her.

This evidence does not amount to evidence of the lesser included offense of assault; rather, defendant's evidence only recapitulates his commission of the elements of the offense of common law robbery, to which he pled guilty; those elements are "the taking of money or goods with felonious intent from the person of another,

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or in his presence, against his will, by violence or putting him in fear." *State v. Irwin*, 55 N.C. App. 305, 307, 285 S.E. 2d 345, 348 (1982). Defendant nowhere presents evidence of his having also committed an independent and distinct offense of assault, the elements of which, according to *State v. Sawyer*, 29 N.C. App. 505, 507, 225 S.E. 2d 328, 328 (1976), are

"an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." [Citations omitted.]

Defendant, therefore, presented evidence that he committed common law robbery, which includes violence or putting in fear, and that he did not have sexual relations with Ms. Newkirk. He did not present evidence from which the jury could reasonably find him also guilty of assault. His evidence of having no sexual relations with Ms. Newkirk goes only to the issue of whether defendant is guilty of second-degree rape or not guilty of second-degree rape. This assignment of error is without merit.

We hold defendant had a fair trial free of prejudicial error.

No error.

Judge HILL concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

G.S. 14-27.3 states that "[a] person is guilty of rape in the second degree if the person engages in *vaginal intercourse* with another person. . . ." (Emphasis added.) The pattern jury instructions on second degree rape state, in pertinent part, that the "State must prove . . . beyond a reasonable doubt that . . . the defendant engaged in *vaginal intercourse* with [another person]." N.C.P.I.—Crim. 207.20. (Emphasis added.) However, the trial court failed specifically to instruct that vaginal intercourse was required in this second degree rape case.

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Believing that the trial court's instructions, in light of the evidence, allowed the jury to return a verdict of guilty of second degree rape without finding that the defendant penetrated the victim's sex organ with his sex organ, I dissent. The trial court's failure to instruct the jury on the element of vaginal intercourse was prejudicial because (1) there can be sexual intercourse in a form other than vaginal intercourse; (2) the evidence of penetration by a sex organ was, in the words of defendant, "weak and equivocal;" and (3) the trial court, when it erroneously gave instructions on second degree sex offense instead of second degree rape, equated "sexual intercourse" with "sexual act" and defined "sex act" as "penetration . . . by *an object* into the genital opening of the person's body." (Emphasis added.)

THE LAW

With the following statement by the majority, ante. page 2, I have no quarrel:

Although there is always sexual intercourse when there is vaginal intercourse, [citation omitted], there are instances in which there may be sexual intercourse in a form other than vaginal intercourse. Hence, strictly speaking, the jury in the present case, following the court's instruction, could have found the defendant guilty of second-degree rape by finding that he engaged in a form of copulative sexual intercourse other than the requisite vaginal intercourse.

On the facts of this case it is not enough to assume that the trial court's instructions on "sexual intercourse" was a sufficient base for a finding of "vaginal intercourse." It is necessary to analyze the evidence and to analyze the effect of the judge's charge on the jury, especially considering the judge's erroneous charge to the jury.

THE EVIDENCE

After a good deal of coaxing, Mrs. Newkirk, the 89-year-old victim of the alleged rape, made two statements: "He ravished me" and he "just done what he wanted and I was underconscious then."<sup>1</sup> Mrs. Newkirk's conclusory testimony may be the result of

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1. The relevant questions and answers during Mrs. Newkirk's direct examination follow.

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her embarrassment as the prosecutor suggested during his direct examination. On the other hand, Mrs. Newkirk may have been unconscious at the time and may not have known exactly what happened. And I deal here not with the credibility of a witness but with the trial judge's duty to instruct specifically on "vaginal intercourse" in view of Mrs. Newkirk's testimony and the following testimony from the physician who examined Mrs. Newkirk. Dr. Simpson testified that he had to use a vaginal speculum designed

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Q. Tell the jury what he did other than just choking you. Did he do anything else?

A. Yes, sir—no, sir—just done what he wanted and I was under conscious then.

Q. What did he do?

A. You know.

MR. CRAFT: Objection. She said she was unconscious.

THE COURT: Overruled.

Q. (Mr. Thagard) Mrs. Newkirk, you're going to have to tell the jury what he did. I know it's embarrassing, but tell them what he did—to them. Tell them what he did to you.

A. I want to see that pillow.

Q. They didn't bring the pillow. They said they couldn't bring it.

A. Where is it?

Q. She's gone to get it, Mrs. Newkirk. Tell the jury what else he did to you. You've got to tell them, Mrs. Newkirk. Please tell the jury what else he did to you.

A. O.K., I will.

Q. Tell them.

A. I will.

Q. Will you go ahead and tell them now, please. Tell the jury what else he did to you.

A. Where's the judge? I can't see.

Q. Well, the jurors are sitting over there. Just tell them what else he did to you other than choking you.

A. He ravished me.

Q. He ravished you? Did you say he ravished you?

A. Yes.

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**State v. Barnes**

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for an immature young girl to examine Mrs. Newkirk; that there was a posterior (interior) vaginal tear, but no bruises upon the external genitalia; that because of the atrophied condition of the vagina, he was unable to say whether the tear occurred on the day of the alleged rape or not. Dr. Simpson then expressed the opinion, based on the interior tear, that something had, at some time, been inserted into the vagina to cause the tear, but specifically said, "I don't know whether the penetration was by a male organ or not," and that "[t]he penetration could have been made by some object or by a finger. . . ."

#### THE COURT'S INSTRUCTIONS

After all the evidence was presented, the trial court mistakenly instructed the jury on the elements of second degree sexual offense, a violation of G.S. 14-27.5. The defendant was not indicted for second degree sexual offense, and it is not a lesser included offense of rape. In the erroneously given instruction, the trial court informed the jury that a "sexual act" is "any penetration however slight *by an object* into the genital opening of a person's body." (Emphasis added.) The trial court then equated "sexual intercourse" with "sexual act" by stating that the defendant would be guilty of second degree sexual offense if he "engaged in *sexual intercourse* with Anna Newkirk. . . ." (Emphasis added.)

At the conclusion of the instructions, the trial court's error was brought to its attention. The trial court then gave the following "curative" instruction.

THE COURT: Members of the jury, I am informed by the District Attorney that it should be second degree rape and I am going to charge you to that. Now, you will disregard what I have said to you with reference to second degree sexual offense. This is what you will be guided by.

Defendant has been accused of second degree rape, which is forcible sexual intercourse with a woman against her will. Now, I charge that for you to find the defendant guilty of second degree rape, the State must prove three things to you beyond a reasonable doubt. First, that the defendant had sexual intercourse with Anna Newkirk. Second, that the defendant used or threatened to use force sufficient to over-

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come any resistance she might make. Third, that Anna Newkirk did not consent and it was against her will. So I charge that if you find from the evidence beyond a reasonable doubt that on or about March 28, 1981, Joe Lee Barnes by the use of force—a pillow and choking had sexual intercourse with Anna Newkirk without her consent and against her will, it would be your duty to return a verdict of guilty of second degree rape.

As can be seen, in describing what the jury must find in order to convict the defendant of rape, the trial court used the term "sexual intercourse," the same term it had used in its mandate in the erroneously given second degree sexual offense charge.

A specific instruction on vaginal intercourse may not be required in every rape prosecution. An instruction on "sexual intercourse" may be sufficient when there is plenary evidence before the jury that the female sex organ was penetrated by a male sex organ. See *State v. Thacker*, 301 N.C. 348, 355-56, 271 S.E. 2d 252, 257 (1980); *State v. Hensley*, 294 N.C. 231, 237-38, 240 S.E. 2d 332, 336 (1978); and *State v. Vinson*, 287 N.C. 326, 341-42, 215 S.E. 2d 60, 71 (1975), *death sentence vacated* 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3204 (1976). However, in the case *sub judice*, when the trial court erroneously instructed on second degree sexual offense and stated that sexual intercourse was the insertion of *any object* into the genitals of the other person, the trial court, in order to cure the erroneous instruction, should have defined vaginal intercourse as penetration of the female sex organ by a male sex organ. I believe the failure to define vaginal intercourse in the purportedly "curative" instructions, especially considering the testimony of Mrs. Newkirk and Dr. Simpson was error. For this reason, I believe the defendant should be awarded a new trial.



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Sullivan v. Smith

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DANIEL J. SULLIVAN AND WIFE, MARY T. SULLIVAN v. K. J. SMITH, INDIVIDUALLY AND D/B/A K. J. SMITH BUILDERS & REALTY, AND GIRRIE M. HOOKER, JR.

No. 8118SC515

(Filed 6 April 1982)

**1. Negligence § 2— negligence in performance of construction—judgment n.o.v. improper**

In an action in which plaintiff homeowner sought damages resulting from a fire in the fireplace which defendant subcontractor constructed under the guidance of defendant contractor, the trial court erred in granting judgment n.o.v. for defendant contractor. Plaintiffs' evidence was sufficient as a matter of law to support jury findings that defendant subcontractor negligently constructed the fireplace, that this negligent construction proximately caused plaintiffs' damage, and that defendant contractor breached his duty to act as a reasonably careful and prudent contractor under the circumstances in that he knew or should have known of the defective workmanship of his subcontractor.

**2. Indemnity § 3; Master and Servant § 21—liability of contractor independent of subcontractor—no right of indemnification**

In an action concerning the negligent construction of a fireplace, plaintiffs' release of the subcontractor did not operate to release the contractor since the contractor was not entitled to indemnification from the subcontractor. The evidence permitted findings that both defendants were actively negligent; that neither was derivatively liable through the other; and that both were responsible for plaintiffs' damages. The release did not by its terms discharge the contractor, but instead expressly excluded him from its operation.

**3. Trial § 52— new trial on grounds of inadequate damages—trial court's discretion**

The award of a new trial on the issue of damages was not an abuse of discretion where the jury returned a verdict for plaintiffs of \$10,000 and in light of evidence that a fire caused by defendants' negligent supervision in the construction of plaintiffs' fireplace reduced the fair market value of plaintiffs' house from \$71,000 to \$12,000; that the fire completely destroyed personal property in the house having a fair market value of over \$47,000; and that plaintiffs incurred lodging expenses of \$2,231.84 while their home was being repaired.

APPEAL by plaintiff from *Collier, Judge*. Order entered 23 February 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 January 1982.

Defendant Smith was the general contractor on a house which plaintiffs purchased from his original vendees. Smith had hired defendant Hooker, a masonry subcontractor, to construct

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**Sullivan v. Smith**

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the fireplace and chimney. Plaintiffs sought from both defendants damages resulting from a fire in the fireplace which spread to adjacent wooden structures. Defendant Smith cross-claimed for indemnity from defendant Hooker.

Before trial plaintiffs released defendant Hooker and voluntarily dismissed their action against him. The court ordered dismissal of defendant Smith's cross-claim.

Following a verdict for plaintiffs the court granted defendant Smith's motion for judgment notwithstanding the verdict (hereafter "judgment NOV") and conditionally granted plaintiffs' motion for a new trial on the issue of damages should the judgment NOV be vacated or reversed.

Plaintiffs appeal from the granting of judgment NOV.

*Smith, Moore, Smith, Schell & Hunter, by Stephen W. Earp and Alan W. Duncan, for plaintiff appellants.*

*Benjamin D. Haines for defendant appellee, K. J. Smith, Individually and d/b/a K. J. Smith Builders & Realty.*

WHICHARD, Judge.

Plaintiffs' sole contention is that the court erred in granting defendant Smith's motion for judgment NOV. We agree, and accordingly reverse.

A motion for judgment NOV "shall be granted if it appears that the motion for directed verdict could properly have been granted." G.S. 1A-1, Rule 50(b)(1). A directed verdict or a judgment NOV for a defendant is improper when a plaintiff's evidence, taken as true and considered in the light most favorable to him, with all inferences made and contradictions resolved in his favor, is sufficient as a matter of law to justify a verdict for plaintiff. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976); *Horton v. Insurance Co.*, 9 N.C. App. 140, 175 S.E. 2d 725 (1970); see also *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Ridge v. Grimes*, 53 N.C. App. 619, 281 S.E. 2d 448 (1981).

Applying these principles to the evidence here, we find the following:

A structural engineer who examined the fireplace and chimney testified that the interior fireplace bricks did not con-

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Sullivan v. Smith

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stitute "solid masonry construction" due to numerous gaps in the mortar, and that in his opinion the construction thus violated the North Carolina Residential Building Code which "specifies that a fireplace shall be constructed of solid masonry construction." See North Carolina Uniform Residential Building Code § 16(5); North Carolina State Building Code § 2716. The North Carolina State Building Code, which was in effect when plaintiff's house was constructed, was adopted pursuant to authorization by G.S. 143-138. It thus had the force and effect of a statute, and violation of its provisions constituted negligence *per se*. *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560 (1960). See also *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767 (1961); *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 189 S.E. 2d 749, *cert. denied*, 281 N.C. 757, 191 S.E. 2d 361 (1972). The engineer's testimony thus permitted a finding of negligence in construction of the fireplace.

Further evidence permitted both that finding and a finding that the negligent construction proximately caused the fire and resultant damage. A fire department official who inspected the premises after the fire testified that "there were gaps in some of the bricks, small areas that did not have mortar in them"; that there "were actually holes going back into the chimney area . . . or the interior of the fireplace"; and that "[t]here were gaps . . . through the layers of brick exceeding twenty-eight inches." He further testified that in his opinion "some spark . . . traveled through these crevices or openings in the bricks and came to rest on [the] wood . . . causing the fire," and that "an escaping spark or ash from the fireplace flowing upward from any point that it may have e[s]caped the fireplace . . . came in contact with the wooden plate that . . . appeared to have been the longest burning area . . . , igniting the wood or dust or whatever items were there . . . ."

[1] The foregoing evidence, in the light most favorable to plaintiffs, permitted a finding that the masonry subcontractor, defendant Hooker, negligently constructed the fireplace, and that this negligent construction proximately caused the fire. The case could go to the jury against the general contractor, defendant Smith, however, only if the evidence permitted a finding that he too violated some duty. "It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act o[r] omission or that consequences

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Sullivan v. Smith

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of a generally injurious nature might have been expected." *McIntyre v. Elevator Co.*, 230 N.C. 539, 544, 54 S.E. 2d 45, 48 (1949).

When ruling on defendant Smith's motion for directed verdict, the court stated that it would allow the case to go to the jury on the principle enunciated in *Lindstrom v. Chesnutt*, *supra*, "as to whether [defendant Smith] exercised the degree of supervision that a reasonably careful and prudent person would have under the same or similar circumstances." That ruling was proper, and the subsequent grant of judgment NOV thus was improper.

In *Lindstrom* this Court (and, by denial of certiorari, the Supreme Court) approved, at least implicitly, the following instruction:

[The contractor] would be responsible for any actions of his subcontractors either in failing to use good quality materials or to construct in a workmanlike manner, or any negligent conduct on their part, if he knew or reasonably should have known as general contractor or builder of the house of those conditions. He is not to be responsible for any such things which a reasonable man in his position as builder and contractor of the house would not have discovered, but the mere fact that work was done by a subcontractor does not relieve the contractor of responsibility if he by the exercise of reasonable care knew or should have known of those conditions.

*Lindstrom*, 15 N.C. App. at 23, 189 S.E. 2d at 755. Plaintiffs presented evidence which permitted a jury finding that defendant Smith, as a reasonably careful and prudent contractor under the circumstances, knew or should have known of the defective workmanship of his subcontractor, defendant Hooker. Defendant Hooker testified that he "saw [defendant Smith] on the job from time to time during the two weeks that [he] built [the] chimney and fireplace," but that he "never saw him looking at the work [Hooker] was doing." He further testified that the exterior brick work was visible while it was under construction; that the exterior and interior bricks "go [up] together"; that other contractors "usually [went] up and look[ed] at the work outside of the fireplace and chimney that they [could] see" when he first did a

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job for them; and that this was the first job he had done for defendant Smith.

"The *standard of care* is a part of the law of the case for the court to explain and apply. The *degree of care* required, under the particular circumstances, to measure up to the standard is for the jury to decide." *Tindle v. Denny*, 3 N.C. App. 567, 570, 165 S.E. 2d 351, 354 (1969). Here the court established as the standard of care the conduct of "a reasonabl[e] . . . and prudent contractor . . . under the same or similar circumstances." It instructed that to adjudge defendant Smith negligent the jury had to find that (1) the fireplace was constructed by defendant Hooker in a negligent manner, (2) this negligent construction was the proximate cause of the fire, and (3) defendant Smith, as the general contractor, knew or reasonably should have known of defendant Hooker's negligence, that knowledge being what a reasonably careful and prudent contractor would have known under the same or similar circumstances. It was for the jury to determine, pursuant to these proper instructions as to the standard of care, whether the evidence showed that the degree of care exercised by defendant Smith "measur[ed] up" to the standard. *Id.*

Defendant Smith's argument that the motion for judgment NOV was properly granted because the evidence tended to show that his "standard of conduct . . . was the same standard that builders in the . . . area adopted or adhered to and there was no breach of this standard or deviation from same" is unavailing. Defendant Hooker's testimony that other contractors "usually look[ed] around" his work on the first job he performed for them, and that defendant Smith had not, contradicted the evidence to which defendant Smith refers. Further, a finding of no breach of duty as a matter of law would not necessarily follow from uncontradicted evidence that defendant Smith observed the standard of care followed by other builders in the area.

[T]he better view . . . is that of the great majority of the cases, that every custom is not conclusive merely because it is a custom, and that it must meet the challenge of "learned reason," and be given only the evidentiary weight which the situation deserves. It follows that where common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent . . . .

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W. Prosser, Law of Torts § 33 at 167-68 (4th ed. 1971).

Nothing else appearing, then, plaintiffs' evidence, taken as true and considered in the light most favorable to them, with all inferences made and contradictions resolved in their favor, was sufficient as a matter of law to support jury findings that defendant Hooker negligently constructed the fireplace, that this negligent construction proximately caused plaintiffs' damage, and that defendant Smith breached his duty to act as a reasonably careful and prudent contractor under the circumstances.

[2] Defendant Smith contends that judgment NOV was nevertheless proper because plaintiffs' release of defendant Hooker also operated to release defendant Smith. The release specifically provided the contrary. It stated: "This Release applies only to the parties named above [i.e., defendant Hooker, his employees, insurer, heirs, representatives, and assigns] and shall not apply to K. J. Smith, individually or doing business as K. J. Smith Builders & Realty, or to any other person, corporation or entity." Defendant Smith thus was not released unless the instrument, despite its express provision to the contrary, effected his release as a matter of law. It did not.

Defendant Smith contends that because defendant Hooker "is entitled to be relieved of defending a cross-action by [defendant Smith], . . . Smith is deprived of his right of indemnification which arises as a matter of law, [and] the party responsible voluntarily for the extinguishment of the rights of indemnification of . . . Smith, namely, the plaintiffs, must sustain a dismissal as to the defendant Smith." He relies primarily on *Brown v. Louisburg*, 126 N.C. 701, 36 S.E. 166 (1900). *Brown* is in apposite, and the argument is without merit.

In *Brown* the individual defendant constructed an excavation abutting the municipal defendant's sidewalk. The municipal defendant knew of the excavation, but had no active part in creating it. Plaintiff fell into the excavation and was injured. During pendency of the action plaintiff released the individual defendant. The court held that under these facts the municipal defendant could recover from the individual defendant any sum which plaintiff obtained from it, and that the court thus "should have instructed . . . that upon the evidence the plaintiff could not recover." *Brown*, 126 N.C. at 704, 36 S.E. at 167. The court stated:

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The defendants were not . . . joint tort feorsors. To make persons joint tort feorsors they must actively participate in the act which causes the injury. The [municipal defendant] had no active part in . . . creating the nuisance. The authorities . . . knew, or ought to have known, of the excavation in the street; but [the individual defendant] did not act under the directions of [the municipal defendant], nor were his acts in any way for its benefit.

*Id.* at 703, 36 S.E. at 167.

Here, by contrast, there was evidence from which the jury could find that both defendants were actively negligent and that they thus were joint tortfeorsors. Defendant Hooker had a duty to use good quality materials and to construct in a workmanlike manner. Defendant Smith had an independent duty of supervision which required that he oversee the proper performance by defendant Hooker of Hooker's duty. *Lindstrom v. Chesnutt, supra*. Further, unlike in *Brown*, defendant Hooker did act or should have acted under the direction of defendant Smith; and the acts of defendant Hooker were performed for defendant Smith's benefit.

A right to indemnity arises in cases of primary-secondary liability, i.e., when two persons

- (1) . . . are jointly and severally liable to the plaintiff . . .
- and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.

*Hendricks v. Fay, Inc.*, 273 N.C. 59, 62, 159 S.E. 2d 362, 365 (1968). See also *Edwards v. Hamill*, 262 N.C. 528, 531, 138 S.E. 2d 151, 153 (1964). This is not such a case. The evidence did not establish conclusively that defendant Smith was "passively negligent but . . . exposed to liability through the active negligence of [defendant Hooker]." *Hendricks*, 273 N.C. at 62, 159 S.E. 2d at 365. Rather, it permitted a finding that defendant Smith was himself actively negligent in the exercise of, or failure to exercise, his duty of supervision of defendant Hooker. Further, it was stipulated that defendant Hooker "at all times . . . was acting as an in-

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dependent subcontractor of [defendant Smith]." "[I]t has long been . . . the general rule that there is no vicarious liability upon the employer" for the torts of an independent contractor. *Id.* Hence, defendant Smith was not "derivatively liable" for the negligence of defendant Hooker.

Defendant Smith, then, was not entitled to indemnification from defendant Hooker. The evidence permitted findings that both defendants were actively negligent; that neither was derivatively liable through the other; and that both were responsible for plaintiffs' damages. The effect of plaintiffs' release of defendant Hooker is thus governed by the following from the Uniform Contribution among Tort-Feasors Act:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . [i]t does not discharge any of the other tort-feasors from liability for the injury . . . unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . . .

G.S. 1B-4 (1967). As noted above, the release here did not by its terms discharge defendant Smith, but instead expressly excluded him from its operation. He thus was not thereby discharged from liability. *Id.*

[3] Plaintiffs' motion for a new trial on grounds of inadequate damages was addressed to the sound discretion of the trial court, and the ruling thereon will not be set aside except upon a showing of abuse of discretion. *Railway Co. v. Fibres, Inc.*, 41 N.C. App. 694, 255 S.E. 2d 749, *cert. denied*, 298 N.C. 299, 259 S.E. 2d 302 (1979); *Gwaltney v. Keaton*, 29 N.C. App. 91, 223 S.E. 2d 506 (1976). The jury returned a verdict for plaintiffs of \$10,000. There was evidence that the fire reduced the fair market value of plaintiffs' house from \$71,000 to \$12,000. There was also evidence that the fire completely destroyed personal property in the house having a fair market value of over \$47,000, and that plaintiffs incurred lodging expenses of \$2,231.84 while their home was being repaired. In light of this evidence, the award of a new trial on the issue of damages in the event the judgment NOV did not stand was not an abuse of discretion.



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The issue of whether to limit the new trial to the issue of damages is likewise "directed to the sound discretion of the trial judge." *Lazenby v. Godwin*, 40 N.C. App. 487, 496, 253 S.E. 2d 489, 494 (1979). No abuse of discretion has been shown in so limiting the new trial conditionally granted here.

For the foregoing reasons, the judgment NOV is reversed, and the cause is remanded to the trial court for a new trial on the issue of damages only.

Reversed and remanded.

Judges CLARK and ARNOLD concur.

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ROSE T. ROBERTS AND HUSBAND, JAMES ROBERTS v. DURHAM COUNTY  
HOSPITAL CORPORATION AND JAMES E. DAVIS

No. 8114SC726

(Filed 6 April 1982)

**1. Limitation of Actions § 4.1; Physicians, Surgeons, and Allied Professions § 13— medical malpractice—leaving foreign object in body—statute of limitations not applied retrospectively**

The statute requiring a malpractice action based upon the leaving of a foreign object in the body during the performance of professional services to be commenced within one year after discovery thereof, G.S. 1-15(c), did not operate retrospectively on an accrued cause of action where plaintiffs injury was not discovered and her claim thus did not accrue until after the effective date of the statute.

**2. Physicians, Surgeons, and Allied Professions § 13— medical malpractice—leaving foreign object in body—constitutionality of statute of limitations**

The statute requiring a malpractice action based upon the leaving of a foreign object in the body during the performance of professional services to be commenced within one year after discovery thereof, G.S. 1-15(c), is not unconstitutionally vague because it fails to define "malpractice" and "professional services." Nor does the statute violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution or the exclusive emoluments provision of Article I, § 32 of the N.C. Constitution when applied in a medical malpractice case since it is rationally related to maintaining sufficient medical treatment in this State.

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APPEAL by plaintiffs from *Herring, Judge*. Judgments entered on 6 and 7 April 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 March 1982.

Plaintiffs initiated this action on 20 November 1980 by obtaining a summons and the filing of a complaint. The allegations of the complaint that are pertinent to this appeal are as follows:

1. On 15 September 1975, plaintiff was admitted by defendant Davis to Watts Hospital, operated by defendant Durham County Hospital Corporation, for esophageal ulceration and perforation which required several days of intensive care unit-type care and multiple intravenous catheters.
2. Plaintiff was discharged on 6 October 1975, and did well except for recurrent swelling and sharp pain in her right arm and shoulder.
3. On 9 January 1978, plaintiff was examined at Duke University Medical Center where she was diagnosed for the first time as having two pieces of intravenous catheter in her cephalic and axillary veins in her arms remaining from the 1975 hospitalization at Watts Hospital.
4. On and after 15 September 1975, defendant Davis and Durham County Hospital Corporation were negligent in failing to insert, maintain and remove the various intravenous catheters which had been placed in plaintiff's right arm. Plaintiff James Roberts, husband of plaintiff Rose T. Roberts, was damaged by way of loss of consortium, services, society, companionship, sexual gratification and affection, as a result of the pain and mental anguish which plaintiff Rose T. Roberts had during the approximate twenty-seven months from 6 October 1975 until the catheters were removed in January of 1978.

Based upon these factual allegations in the complaint and on the face of the record, Judge Herring granted both defendants' motions for dismissal under Rule 12(b)(6), N.C. Rules Civ. Proc., for the reason that the statute of limitations had, as a matter of law, barred the claim at the time it was filed on 20 November 1980. From said ruling, plaintiffs appealed to this Court.

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**Roberts v. Durham County Hospital Corp.**

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*Grover C. McCain, Jr., for the plaintiff-appellants.*

*Young, Moore, Henderson & Alvis by Walter Brock, Jr., for the defendant-appellee James E. Davis.*

*Haywood, Denny & Miller by George W. Miller, Jr., for the defendant-appellee Durham County Hospital.*

MARTIN (Robert M.), Judge.

This case questions the constitutionality of N.C. Gen. Stat. § 1-15(c) which provides for a special limitation period for malpractice actions against professionals. Plaintiffs argue that the statute operates to unconstitutionally deny them a reasonable time in which to file their action; that it is discriminatory, denies equal protection of the laws, and is vague. We affirm the decision of the trial court.

The legislative history of N.C. Gen. Stat. § 1-15 is important to the resolution of this appeal. Prior to 1971 a cause of action for malpractice based on the surgeon's negligence in leaving a foreign object in the body at the conclusion of an operation, accrued immediately upon the closing of the incision, and such action could not be maintained more than three years thereafter even though the consequential damage from such negligence was not discovered until sometime after the operation. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957).

Between 1971 and 1 January 1977, plaintiff's cause of action would have been controlled by N.C. Gen. Stat. § 1-15(b) which provided that in professional malpractice claims, the cause of action accrued at the "time the injury was discovered by the claimant, or ought reasonably to have been discovered by him . . . ; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief." Thus between 1971 and 1977 a plaintiff had three years from the date of discovery to bring suit, with an outside time limit of ten years.

Effective 1 January 1977, N.C. Gen. Stat. § 1-15 again was amended to provide:

(c) Except where otherwise provided by statute a cause of action for malpractice arising out of the performance of or

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failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

Based on N.C. Gen. Stat. § 1-15(c), the trial court dismissed plaintiffs' action because they filed it greater than one year after the discovery of the catheter in Mrs. Roberts' arm.

[1] Plaintiffs argue that because N.C. Gen. Stat. § 1-15(b) was in effect at the time of the last act of defendants, that N.C. Gen. Stat. § 1-15(c) should not operate retroactively to bar their claim. As applied in this case, N.C. Gen. Stat. § 1-15(c) does not operate retroactively to affect an accrued cause of action. The general rule applicable in such cases was stated in *Flippin v. Jarrell*, 301 N.C. 108, 113, 270 S.E. 2d 482, 486 (1980):

It is well established that the legislature may, without affecting vested interests, shorten or extend a pre-existing period of limitation. [Citations omitted] If the new statute shortens the period, however, it must, to comport with due process, provide a reasonable time for filing actions *which have ac-*

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crued but which have not been filed when the new statute takes effect. [Citations omitted] [emphasis added]

The statute in question does not operate retrospectively on an accrued cause of action in this case because plaintiffs' claim did not *accrue* prior to the effective date of N.C. Gen. Stat. § 1-15(c). In 1975 at the time of the alleged negligent acts by defendants, N.C. Gen. Stat. § 1-15(b) provided that a cause of action for medical malpractice accrued when the claimant discovered or reasonably should have discovered the latent injury. Plaintiffs discovered the injury for the purposes of this appeal on 9 January 1978. Thus at the time plaintiffs' action accrued, N.C. Gen. Stat. § 1-15(c) was in effect and properly limited plaintiffs' time in which to file suit to one year from date of discovery. Thus plaintiffs' argument is without merit and is overruled.

[2] In their remaining arguments, plaintiffs attack the constitutionality of N.C. Gen. Stat. § 1-15(c). They initially argue that the statute is unconstitutionally vague because it fails to define "malpractice" or "professional services." Plaintiffs assert that it is difficult to determine whether certain occupations fall within the statute so as to be entitled to assert the limitation period within N.C. Gen. Stat. § 1-15(c). A similar challenge was rejected in *Horn v. Burns and Roe*, 536 F. 2d 251 (8th Cir. 1976). *Horn* considered Nebraska's statute of limitations for actions based upon professional negligence, which is similar to our statute and uses the term "professional services." That court quoted with approval *Big Eagle v. Andera*, 508 F. 2d 1293, 1297 (8th Cir. 1975), which reasoned:

The potential vagueness of a statute as applied in hypothetical cases is no ground for holding the statute unconstitutional. A defendant cannot claim that a statute is unconstitutional in some of its reaches if it is constitutional as applied to him.

See also *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973).

Even if the statute may be vague as to certain classes of occupations, it is not vague as to these defendants, a doctor and a hospital. Where a term such as "malpractice" or "professional service" has been used over such a lengthy period of time that its usage has given the term well-defined contours such a term will

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not be found inadequate. See *In re Willis*, 288 N.C. 1, 11, 215 S.E. 2d 771, 777, *appeal dismissed*, 423 U.S. 976, 46 L.Ed. 2d 300, 96 S.Ct. 389 (1975). In the same act which created N.C. Gen. Stat. § 1-15(c), the legislature defined those persons contemplated to fall within the scope of medical malpractice actions. N.C. Gen. Stat. Chapter 90, Article 1B, "Medical Malpractice Actions" defines "health care provider" in § 90-21.11:

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, . . . or a hospital as defined by G.S. 131-126.1(3); . . . or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital or nursing home.

N.C. Gen. Stat. § 90-21.12 contemplates that a medical malpractice action involves "any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care. . . ." The statute is not vague as applied to these defendants. Thus plaintiffs' argument is without merit and is overruled.

Plaintiffs contend that N.C. Gen. Stat. § 1-15(c) violates the federal constitutional guarantees of equal protection and the North Carolina Constitution's equal protection provision prohibiting exclusive emoluments contained in Article I § 32. It is fundamental that a person seeking to raise the question as to the validity of an allegedly discriminatory statute has no standing for that purpose unless he belongs to the class allegedly prejudiced by the statute. *In Re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974). As stated in *State v. Trantham*, 230 N.C. 641, 644, 55 S.E. 2d 198, 200-01 (1949):

When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. 11 A.J. 757. He who seeks to raise the question as to the validity of a discriminatory

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statute has no standing for that purpose unless he belongs to the class which is discriminated against.

The discrimination of which plaintiffs complain concerns alleged discrimination against other occupations who are not encompassed within the class defined in N.C. Gen. Stat. § 1-15(c). Plaintiffs are not aggrieved by the allegedly discriminatory nature of the statute and have no standing to challenge its validity.

Assuming that plaintiffs had standing to attack N.C. Gen. Stat. § 1-15(c), the statute is not unconstitutionally discriminatory. In examining an equal protection question it is necessary to determine the nature of the interest which is allegedly subjected to discriminatory treatment. It is the nature of the interest at stake which determines the applicable equal protection test. Strict judicial scrutiny of legislative classifications is required only when the classifications impinge impermissibly upon the exercise of fundamental rights or operate to the peculiar disadvantage of a suspect class of people. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973). Otherwise, in North Carolina a "lower tier" analysis or "rational basis" test is utilized. *McGowan v. Maryland*, 366 U.S. 420, 425-26, 6 L.Ed. 2d 393, 399, 81 S.Ct. 1101, 1105 (1961) enunciates the rational basis test:

The constitutional safeguard (of equal protection) is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it.

See *Church v. State*, 40 N.C. App. 429, 447-48, 253 S.E. 2d 473, 484 (1979), *aff'd* 299 N.C. 399, 263 S.E. 2d 726 (1980).

Non-professionals do not constitute a suspect class. In *Hohn v. Slate*, 48 N.C. App. 624, 626, 269 S.E. 2d 307, 308 (1980), *disc. rev. denied*, 301 N.C. 720, 274 S.E. 2d 229 (1981), our Court determined that:

Persons with malpractice claims are not a suspect class and a classification so as to shorten the statute of limitations as to

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them does not affect a fundamental interest. This classification is not inherently suspect.

Thus because neither nonprofessionals nor persons with malpractice claims belong to a suspect class, we are applying a rational basis test.

In the present case we are dealing with alleged medical malpractice on the part of a physician and a hospital. We are thus applying the rational basis test to N.C. Gen. Stat. § 1-15(c) in terms of medical malpractice. It is generally agreed that in the early 1970's what has been termed a medical malpractice insurance crisis existed in most jurisdictions in this country. The crisis resulted from the increasing reluctance of insurance companies to write medical malpractice insurance policies and the dramatic rise in premiums demanded by those companies which continued to issue policies. The difficulty in obtaining insurance at reasonable rates forced many health-care providers to curtail or cease to render their services. The legislative response to this crisis sought to reduce the cost of medical malpractice insurance and to insure its continued availability to the providers of health care. By October 1975, 39 states had commissioned studies of the medical malpractice problem and 22 states had revised civil practice laws and rules in an attempt to remedy the problem. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 Tex. L. Rev. 759, 761 n. 14 (1977); see generally, American Bar Association, *Report of the Commission on Medical Professional Liability* (1977).

In North Carolina, the Report of the North Carolina Professional Liability Insurance Study Commission (1976), analyzed the malpractice crisis in this state. The commission found that nationwide the number of malpractice suits increased by 70% from 1973 to 1974 and that this malpractice dilemma began to surface in North Carolina in 1974. The St. Paul Fire and Marine Insurance Company, which at that time insured over 90% of the physicians and surgeons practicing in this state as well as 75 hospitals, requested an 82.03% increase in its malpractice rates and threatened to withdraw from the state if the increase was not granted. Shortly thereafter, St. Paul requested another premium rate increase and a change in policy form from "occurrence" to "claims-made" and in September 1975 decided to cease offering coverage



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in North Carolina. After much negotiation a compromise was reached between the Commissioner of Insurance and St. Paul, so they again began offering coverage in North Carolina. *Id.* at 4-16. The bulk of the rate increases by St. Paul was for reserves for claims that were "incurred but not reported." *Id.* at 7 Reports of curtailments in health care services by some doctors and a few hospitals in the state were received by the Study Commission as it began to explore ways to increase the availability of insurance. *Id.* at 12. The Study Commission recommended lowering the outside time limit to four years for actions based on professional malpractice, including the foreign object cases. During the four year period, it advised allowing only one year from the date of discovery in which to bring an action. *Id.* at 28. The legislature responded by enacting N.C. Gen. Stat. § 1-15(c).

The legislative purpose to be served by this statute as it relates to these defendants is clear. This statute was passed by the General Assembly in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims. Many other states have passed similar legislation concerning health care providers, and we find no case striking down such a statute. See e.g. *Sellers v. Edwards*, 289 Ala. 2, 265 So. 2d 438 (1972); *Landgraff v. Wagner*, 26 Ariz. App. 49, 546 P. 2d 26 (1976); *McCarthy v. Goldstein*, 151 Colo. 154, 376 P. 2d 691 (1962); *Hamby v. Neurological Associates, P.C.*, 243 Ga. 698, 256 S.E. 2d 378 (1979) (per curiam); *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E. 2d 560 (1979); *Carmichael v. Silbert*, --- Ind. App. ---, 422 N.E. 2d 1330 (1981); *Stephens v. Snyder Clinic Association*, 230 Kan. 115, 631 P. 2d 222 (1981). This statute as applied in this case does not violate the equal protection clause of the federal constitution or the exclusion emoluments provision in the State constitution because it is rationally related to maintaining sufficient medical treatment in this State.

For the foregoing reasons the trial court properly dismissed plaintiffs' cause of action.

Affirmed.

Judges MARTIN (Harry C.) and ARNOLD concur.

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**Caviness v. Administrative Office of the Courts**

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WAYLAND HENRY CAVINESS v. ADMINISTRATIVE OFFICE OF THE COURTS

No. 8110IC565

(Filed 6 April 1982)

**Automobiles § 2.4; Clerks of Court § 13; State § 8.1— revocation of driver's license—erroneous information from assistant clerk of court—no contributory negligence by licensee**

In a tort claim action to recover damages allegedly resulting from the negligence of an assistant clerk of court in causing the Department of Motor Vehicles erroneously to revoke plaintiff's driver's license for driving under the influence by notifying the Department that plaintiff had been convicted of a second offense of driving under the influence when defendant had pleaded guilty to the lesser offense of careless and reckless driving, plaintiff was not contributorily negligent in failing to notify the clerk of superior court or the Department of Motor Vehicles that his license had been revoked by mistake where plaintiff went to his attorney for legal guidance; the attorney told plaintiff he would "straighten it out," took plaintiff's driver's license, and gave plaintiff a note stating that the attorney had the license; plaintiff was thereafter arrested for driving while his license was revoked; and a subsequent lawsuit instituted by plaintiff resulted in the correction of the records of the Department of Motor Vehicles and the rescission of his license revocation.

Judge HEDRICK dissenting.

APPEAL by plaintiff from the Industrial Commission Opinion and Award entered 19 January 1981. Heard in the Court of Appeals 2 February 1982.

This action by the plaintiff was brought under the provisions of G.S. 143-291 to recover damages allegedly caused by the negligent and erroneous filing of information with the North Carolina Department of Motor Vehicles which resulted in an incorrect record entry that plaintiff's driver's license had been revoked.

A hearing was held on this matter, and on 31 December 1979 the Deputy Commissioner entered the following order, in pertinent part, denying plaintiff's claim:

Stipulations

. . . .

2. That Virginia Way Lewallen was an employee of the State of North Carolina, and that said employee was acting at the time within the scope of her employment.

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**Caviness v. Administrative Office of the Courts**

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. . . .

Based upon all the competent evidence adduced at the hearing the undersigned makes the following additional

*Findings of Fact*

1. On January 4, 1975, the plaintiff was arrested and charged with the second offense of driving under the influence and failing to yield the right-of-way. The plaintiff was tried and was found guilty of these offenses in Randolph County District Court on April 22, 1975. He appealed these convictions to the Randolph County Superior Court where he was allowed to plead guilty to the lesser offense of careless and reckless driving on July 10, 1975. . . .

2. Prior to and on July 18, 1975, Virginia Way Lewallen was working as an Assistant Clerk of the Randolph County Superior Court for the defendant. . . .

3. On July 18, 1975, Virginia Way Lewallen completed and forwarded Form DL 47 to the North Carolina Department of Motor Vehicles stating incorrectly that the plaintiff had been convicted of the second offense of driving under the influence and failing to yield the right-of-way. . . . She did not keep a copy of this form or mail a copy to the plaintiff.

4. A letter dated August 26, 1975 (Official Notice and Record of Revocation of Driving Privilege) was prepared by and mailed to the plaintiff by Lessie Truelove, a checker with the North Carolina Department of Motor Vehicles. The information in this letter advised the plaintiff that his driving privilege was revoked for one year for driving under the influence of intoxicating liquor or drugs effective September 5, 1975, that he was directed to mail his driver's license to the North Carolina Department of Motor Vehicles and that it was unlawful to drive while his license was revoked. . . .

5. Sometime after August 26, 1975, the North Carolina Department of Motor Vehicles sent a request to the North Carolina Highway Patrol to pick up the driver's license of the plaintiff and sent a notice to the Chief of Police in Asheboro indicating the driving privilege of the plaintiff had been withdrawn during the week ending August 29, 1975. . . .

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. . . .

7. Sometime between August 26, 1975 and October 22, 1975, the plaintiff went to his attorney, who took the plaintiff's driver's license and gave him a note stating that the attorney had the plaintiff's driver's license.

8. . . . On October 22, 1975, Sgt. Austin [of the Asheboro Police Department] saw the plaintiff driving a vehicle and gave him a citation for driving while his operator's license was revoked. . . . The plaintiff gave Sgt. Austin the note from his attorney and told him that there was a mistake because his driver's license was not revoked. After the plaintiff got the citation he saw his attorney again.

9. On November 4, 1975, the plaintiff through his attorney filed an action against Edward L. Powell, Commissioner of the North Carolina Department of Motor Vehicles, to restrain the Department of Motor Vehicles from depriving him of his lawful privilege to operate a vehicle. . . .

10. District Court Judge L. T. Hammond, Jr. found the plaintiff was not guilty of driving while his operator's license was revoked on or about December 31, 1975.

11. Superior Court Judge Douglas Albright entered a Judgment against Edward L. Powell, Commissioner of North Carolina Department of Motor Vehicles on April 16, 1976. Said Judgment reveals that a corrected record showing the plaintiff was convicted of careless and reckless driving had been furnished to the Division of Motor Vehicles; that the Division had corrected its records to show the plaintiff was convicted on July 10, 1975, of careless and reckless driving for an offense occurring on January 4, 1975; that the offense of driving under the influence had been removed from the record; that the revocation for driving under the influence effective September 5, 1975, had been rescinded and removed from the records; and that the pick-up notice issued for driving under the influence had been rescinded. . . .

12. According to J. T. Barker, Jr., Assistant Director of Driver's Services for the North Carolina Department of Motor Vehicles, a citizen's Driver's License Record Check For Enforcement Agencies may be corrected (1) by filing a

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civil action, (2) by having the Clerk of Court file a corrected Form DL 47 with the North Carolina Department of Motor Vehicles, and (3) by writing to the North Carolina Department of Motor Vehicles. J. T. Barker, Jr. has no knowledge of receiving a corrected Form DL 47 from the Clerk of Court or a letter from the plaintiff with respect to the matter in question.

13. According to Linda Gallamore, Assistant Clerk of the Randolph District Court, mistakes on Form DL 47 are corrected by filing a corrected Form DL 47 with the North Carolina Department of Motor Vehicles when citizens notify the Clerk's office of the error. She was never requested to file a corrected Form DL 47 with the North Carolina Department of Motor Vehicles with respect to the matter in question.

14. Virginia Way Lewallen does not recall anyone requesting a corrected Form DL 47 be filed with the North Carolina Department of Motor Vehicles with respect to the matter in question.

. . . . .

17. The defendant, Administrative Office of the Courts' employee, Virginia Way Lewallen, was negligent in that she erroneously notified the North Carolina Department of Motor Vehicles that the plaintiff had been convicted of the second offense of driving under the influence and failing to yield the right-of-way and said negligence resulted in damages to the plaintiff.

18. The plaintiff was negligent in that he did not act as a reasonable and prudent person would have acted under the same or similar circumstances since he did not notify the North Carolina Department of Motor Vehicles or the Clerk of Randolph County Superior Court that his driver's license had been revoked by mistake and said negligence concurred with the negligence of the defendant, Administrative Office of the Courts' employee, and resulted in damages to the plaintiff.

The foregoing findings of fact and conclusions of law engender the following additional

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Conclusions of Law

1. The negligent acts on the part of the defendant, Administrative Office of the Courts' employee, resulted in damages to the plaintiff at the time and place heretofore described. G.S. 143-291, *et seq.*

2. The negligent acts on the part of the plaintiff contributed to his resulting damages at the time and place heretofore described. G.S. 143-291, *et seq.*

3. The defendant, Administrative Office of the Courts, is not legally responsible for the damages suffered by the plaintiff. G.S. 143-291, *et seq.*

Upon plaintiff's appeal, the Commission on 19 January 1981 adopted and affirmed the deputy commissioner's order as its own. Plaintiff excepted to this order of the Commission and appealed to this Court.

*Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.*

*Ottway Burton, P.A., for plaintiff-appellant.*

BECTON, Judge.

Plaintiff argues on this appeal that the Commission committed reversible error in adopting and affirming the finding that he was contributorily negligent and denying his claim.

We first recognize that this Court's review of a decision of the Industrial Commission in a case arising under the Tort Claims Act is ordinarily limited to two questions: whether the Commission's findings of fact are supported by competent evidence, and whether the facts found in the order support the conclusions of law. *Tanner v. Dept. of Correction*, 19 N.C. App. 689, 691, 200 S.E. 2d 350, 351 (1973). Findings of fact supported by competent evidence are conclusive on appeal and the appellate court may not find additional facts even in the face of evidence in the record to support them, since under G.S. 143-293 this type of appeal is "for errors of law only." *Brown v. Board of Education*, 269 N.C. 667, 670, 153 S.E. 2d 335, 338 (1967).

We have carefully reviewed the findings of fact in the order which were made the subject of exceptions by the plaintiff and

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have found that all of them have support in the evidence in the record. Therefore, the sole question on this appeal is whether the Commission was correct in its conclusion that plaintiff was contributorily negligent based upon the facts found. We hold that it was not.

The Tort Claims Act authorizes recovery only if the claimant is free from contributory negligence. *Crawford v. Board of Education*, 275 N.C. 354, 362-63, 168 S.E. 2d 33, 39 (1969). The same rules regarding negligence and contributory negligence which pertain in litigation between private individuals apply in actions under the Tort Claims Act. *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E. 2d 273, 277 (1972). The burden of proving the plaintiff's contributory negligence is on the State. G.S. 143-299.1.

Whether a person will be deemed contributorily negligent depends on the peculiar facts of each case. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 677, 268 S.E. 2d 504, 509 (1980). As aptly summed up in *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E. 2d 276, 279 (1951), "This is so because the true and ultimate test is this: What would a reasonably prudent person have done under the circumstances as they presented themselves to the plaintiff?"

In the case at hand plaintiff knew that on 10 July 1975 he had pleaded guilty in superior court to the lesser offense of careless and reckless driving and thereby kept his driving license. Yet, he nevertheless received a letter dated 26 August 1975 which stated that his driving privilege was revoked for one year for driving under the influence of intoxicating liquor or drugs effective 5 September 1975. Between the date of receiving this letter containing information which he knew to be in error and the date of his arrest, plaintiff went to his attorney for advice on this matter. His attorney took his driver's license and gave him a note explaining that his license was in the hands of his attorney. Plaintiff further testified that his lawyer, Mr. Burton, told him a mistake had been made; that Mr. Burton told plaintiff he "had been notified" and would "straighten it out;" and that Mr. Burton telephoned someone concerning the mistake in plaintiff's presence.

On 22 October 1975 plaintiff was given a citation by a police officer for driving while his operator's license was revoked. Plaintiff promptly showed the officer the note from his attorney and

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told him there was a mistake because his driver's license was not revoked. A subsequent lawsuit instituted by plaintiff resulted in the correction of the records of the Department of Motor Vehicles along with the rescission of plaintiff's license revocation.

In all of the above, plaintiff, knowing that a mistake had been made, went to this attorney for legal advice and guidance. We believe that the action of the plaintiff under these circumstances in going back to the attorney he had paid to save his driver's license and in following the directions of this attorney, whom he trusted to correctly counsel him as to the legal consequences of his conduct, was consistent with that of a reasonable and prudent person. Plaintiff may have realized that he would ultimately be stopped if the mistake was not corrected promptly. Indeed, he may have assumed the risk of being stopped and having to go back to court to "straighten it out." These factors may relate to his damages; they do not, in our view, establish that plaintiff was contributorily negligent.

In light of our decision, we do not reach the issue of what damages, if any, plaintiff has suffered in this matter but remand this case to the Commission for a further hearing consistent with this opinion.

Reversed and remanded.

Judge HILL concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

I respectfully dissent from the opinion of the majority and vote to affirm the opinion and award of the Industrial Commission; however, I disagree with the reasoning of the Industrial Commission which found and concluded that the defendant was negligent and that such negligence was a proximate cause of damages to the plaintiff. The evidence and the findings support the conclusion that the deputy clerk of superior court was negligent in reporting on 18 July 1975 that plaintiff had been convicted of a second offense of driving under the influence and failing to yield the right-of-way, but the evidence and findings do not



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support the conclusion that such negligence was a proximate cause of damages suffered by plaintiff. The erroneous report was sent by the deputy clerk on 18 July 1975 and plaintiff was advised on 26 August 1975 that his driving privileges were revoked effective 5 September 1975. Plaintiff was not arrested for driving after his license was revoked until 22 October 1975. Any damages suffered by plaintiff flowed from this arrest. Thus the sole proximate cause of plaintiff's damages, if any, was his conduct in driving after he received the notice that his license had been revoked. In my opinion the evidence and findings support and require such a conclusion.

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LESSIE SIMMONS v. C. W. MYERS TRADING POST, INC.

No. 8121DC553

(Filed 6 April 1982)

**1. Landlord and Tenant § 8.1— plaintiff's claim not covered by Residential Rental Agreements act**

Plaintiff's claim for relief based upon an alleged breach of the Residential Rental Agreements act by defendant was invalid since the act did not become effective until 1 October 1977 and the written agreement between plaintiff and defendant was signed one year prior to that date.

**2. Consumer Credit § 1— Retail Installment Sales Act—lease with option to purchase trailer—consumer credit sale**

An agreement between the parties, entitled "Lease with Option to Purchase Trailer," constituted a consumer credit sale under North Carolina's Retail Installment Sales Act. G.S. § 25A-2(b).

**3. Uniform Commercial Code § 26— damages for breach of warranty**

Under G.S. § 25-2-714(2), damages for defendant's violation of its express warranty to repair a trailer leased to plaintiff is the total payments made by plaintiff over the total value of the trailer as warranted since plaintiff had not made the total payments required to exercise her option to buy the trailer. If the jury returned a verdict in favor of plaintiff, she would be entitled to treble damages. G.S. § 25A-44(4).

**4. Evidence § 45— plaintiff's opinion as to value of property—erroneously excluded**

In an action concerning violation of express warranty to repair a trailer sold by defendant to plaintiff, the trial court erred in excluding plaintiff's opinion as to the value of the trailer while she inhabited it, the value of the trailer in the condition it was purchased, and the amount plaintiff paid in excess of

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the trailer's worth since the evidence was sufficient to show that plaintiff possessed the familiarity, knowledge and experience to testify about the trailer's value.

Judge VAUGHN concurring in part and dissenting in part.

APPEAL by plaintiff from *Alexander, Judge*. Judgment entered 10 February 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 1 February 1982.

On 18 September 1976, plaintiff signed a lease with option to purchase a 1969 Fleetwood house trailer from defendant. On that date the cash value of the trailer was approximately \$5,500 to \$6,000. Pursuant to this agreement, plaintiff agreed to pay rent in the amount of \$85 per month for ninety-six months. Upon completion of these payments, plaintiff was to become owner of the trailer. Plaintiff lived in the trailer until 14 July 1979 when it was destroyed by fire. She had paid defendant a total of \$2,370.

In her complaint, filed on 4 December 1979, plaintiff alleged that prior to the execution of the written agreement signed by the parties, defendant's agent, C. W. Myers, agreed to repair defects in the trailer; that Myers failed to remedy the majority of these defects and that his failure to do so reduced the fair market rental value of the trailer from \$85 to \$50 per month. In her first claim for relief, she alleged that defendant had violated the Residential Rental Agreements act by failing to maintain the trailer in fit and habitable condition. N.C. Gen. Stat. §§ 42-38 to -44 (Cum. Supp. 1981). In her second claim for relief, plaintiff sought recovery under the Retail Installment Sales Act. N.C. Gen. Stat. §§ 25A-1 to -45 (Cum. Supp. 1981). In her final claim, plaintiff alleged that a portion of her payment to defendant represented her equity in the trailer. She further alleged that defendant had received insurance proceeds due to the destruction of the trailer; and that she was "entitled to receive from defendant a sum representing her share of the insurance proceeds, in an amount to be proven at trial."

In its answer defendant denied plaintiff's claim for relief and alleged that plaintiff, by failing to comply with the terms and conditions of the written agreement, did not exercise her option to buy the trailer. Defendant further alleged that plaintiff had an option to insure her interest in the trailer but failed to do so.

The case proceeded to trial against defendant on the following three issues:

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*Issue No. 1*—Did the defendant give plaintiff an express warranty to repair the trailer?

*Issue No. 2*—Did the defendant knowingly and wilfully include in the contract a provision limiting, excluding, modifying or in any manner altering the terms of an express warranty given by the defendant to the plaintiff?

*Issue No. 3*—In what amount, if any, has plaintiff been damaged as a result of her relying on defendant's promises to make repairs?

After plaintiff presented evidence at the jury trial, defendant moved for a directed verdict. Plaintiff appeals from the judgment directing a verdict in defendant's favor and dismissing plaintiff's action with prejudice.

*Legal Aid Society of Northwest North Carolina, Inc., by Kate Mewhinney, for plaintiff appellant.*

*Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Richard G. Badgett and Herman L. Stephens, for defendant appellee.*

MARTIN (Harry C.), Judge.

Plaintiff's first three assignments of error concern the trial court's exclusion of her testimony regarding the value of the trailer in question. She argues that this testimony was competent in determining the issue of damages. She further contends that its exclusion constituted prejudicial error, because the trial court granted defendant's motion for a directed verdict on the basis of plaintiff's failure to present evidence of damages.

[1] In evaluating the merits of plaintiff's argument, this Court must first determine the merits of plaintiff's three claims for relief. Plaintiff's first claim for relief, based upon the alleged breach of the Residential Rental Agreements act by defendant, is invalid. This act did not become effective until 1 October 1977. The written agreement between plaintiff and defendant was signed almost one year prior to this date. In plaintiff's third claim for relief, she sought to recover a share of the insurance proceeds recovered by defendant after the trailer burned. Plaintiff failed to present any authority or evidence supporting this claim.

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Moreover, upon considering the three issues presented to the jury, it appears that plaintiff relied solely upon her second claim for relief at trial.

[2] Plaintiff's second claim for relief relies upon a breach of the Retail Installment Sales Act. In her complaint plaintiff alleged that the agreement between the parties, entitled "Lease with Option to Purchase Trailer," constituted a consumer credit sale under North Carolina's Retail Installment Sales Act. Under this act such a sale

includes but is not limited to any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods and services involved, and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration, has the option to become, the owner of the goods and services upon full compliance with his obligations under such contract.

N.C. Gen. Stat. § 25A-2(b) (Cum. Supp. 1981). The parties' written agreement comes within this definition. The parties stipulated that plaintiff had missed some of her monthly payments. This delinquency, though, did not terminate the agreement since defendant never exercised its option in the agreement to terminate the contract upon plaintiff's failure to make a payment. Plaintiff further alleged in her complaint that defendant violated N.C.G.S. 25A-20 of the Retail Installment Sales Act by including in the agreement the words, "Leased as is." These words excluded defendant's express warranty to repair the trailer. She alleged that a willful violation of N.C.G.S. 25A-20 constituted an unfair trade practice entitling her to treble damages. *See* N.C. Gen. Stat. § 25A-44(4) (Cum. Supp. 1981).

At trial plaintiff presented testimony that Myers informed her he would fix specified defects in the trailer before it was delivered; that the trailer was delivered in its defective condition; that plaintiff repeatedly requested Myers to repair the trailer after it was delivered; that Myers continued to promise that the repairs would be made, and that the defects were never repaired. Plaintiff also offered into evidence the written agreement signed by the parties. This agreement contained a list of defects to be repaired. Plaintiff, therefore, was entitled to present evidence of

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damages caused by the alleged breach of defendant's express warranty to repair.

[3] Under the Uniform Commercial Code, the general measure of damages for breach of warranty "is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." N.C. Gen. Stat. § 25-2-714(2) (1965). Special circumstances in the case sub judice would seem to require that plaintiff recover only a fraction of the difference between the fair market value of the trailer as delivered and the value of the trailer as warranted. Specifically, at the time the trailer burned, plaintiff had not made the total payments required to exercise her option to buy the trailer. The fraction to which she is entitled is therefore the total payments made by plaintiff over the total value of the trailer as warranted. In the event of a jury verdict in favor of plaintiff upon retrial, she would be entitled to treble damages. N.C. Gen. Stat. § 25A-44(4) (Cum. Supp. 1981).

[4] During the trial the court sustained defendant's objections to questions pertinent to the issue of damages. These questions concerned plaintiff's opinion as to the value of the trailer while she inhabited it, the value of the trailer in the condition it was purchased, and the amount plaintiff paid in excess of the trailer's worth. In response to a question concerning the fair market value of the trailer at the time it burned, plaintiff indicated that the value was "[a]bout half of what I was supposed to pay for it." The court instructed the jury to disregard this answer. We disagree with defendant's argument that plaintiff was not a competent witness regarding the value of her trailer.

A witness may give his opinion as to the value of specific personal property if he has obtained his knowledge of value from experience, information, and observation. The witness need not be an expert; it is sufficient that he is familiar with the thing upon which he places a value and has the knowledge and experience necessary to enable him to intelligently value it. 1 Stansbury, North Carolina Evidence § 128 (Brandis rev. 1973).

*State v. Revelle*, 301 N.C. 153, 160, 270 S.E. 2d 476, 480 (1980). In the case sub judice, plaintiff's testimony reveals that she lived in

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the trailer at issue for three years and that she had previously purchased another trailer from defendant. This evidence is sufficient to show that plaintiff possessed the familiarity, knowledge and experience to testify about the trailer's value. The trial court denied plaintiff's testimony on the erroneous basis that such evidence of value would have to be given by "a realtor specialist or somebody in that field."

Defendant argues in its brief that regardless of plaintiff's qualifications to answer questions concerning the value of the trailer, she failed to place her answers in the record for purposes of review. Defendant emphasizes that no prejudice has been shown by the court's action. In *Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978), the Court was confronted with this issue and came to the following conclusion:

[W]e . . . hold that, whether an objection be to the admissibility of testimony or to the competency of a witness to give that, or any, testimony, the significance of the excluded evidence must be made to appear in the record if the matter is to be heard on review. Unless the significance of the evidence is obvious from the record, counsel offering the evidence must make a specific offer of what he expects to prove by the answer of the witness.

*Id.* at 99-100, 249 S.E. 2d at 390. The second sentence quoted from *Currence* is dispositive of the question before us. At trial plaintiff attempted to show how much the value of the trailer as promised had been diminished by the defects in the trailer. The significance of this testimony, in determining damages caused by the breach of defendant's express warranty, clearly did not depend upon the exact numerical answers plaintiff would have given. It is obvious from her complaint that she would have testified that the trailer's value as delivered was less than the value of the trailer as promised.

In light of the trial court's erroneous exclusion of this testimony regarding the value of the trailer, the order allowing defendant's motion for directed verdict upon failure of plaintiff to show damages must be reversed. When a defendant moves for a directed verdict at the close of plaintiff's evidence, the trial judge must determine whether the evidence when considered in the light most favorable to the plaintiff and when given the benefit of

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every reasonable inference to be drawn therefrom, is significant to withstand defendant's motion. *Beal v. Supply Co.*, 36 N.C. App. 505, 244 S.E. 2d 463 (1978). Plaintiff's testimony, including that pertaining to the trailer's value, constitutes sufficient evidence of an action for breach of an express warranty under the Retail Installment Sales Act and of damages caused by the breach.

As to plaintiff's first and third claims for relief, the trial court's directed verdict and dismissal against plaintiff is affirmed. The directed verdict and dismissal in regards to plaintiff's second claim for relief is reversed. In light of this holding, we deem it unnecessary to discuss plaintiff's fourth assignment of error. The cause is remanded to the District Court of Forsyth County for a new trial on plaintiff's second claim for relief.

Reversed in part; affirmed in part.

Chief Judge MORRIS concurs.

Judge VAUGHN concurs in part and dissents in part. (Judge VAUGHN'S concurring and dissenting opinion is reported at page 816.)

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CARLIE PEELE AND WIFE, LESSIE PACE PEELE, BERTA PEELE FLOWERS, WIDOW, JOHN VERNON PEELE, JR. AND WIFE, FRANCES BRYANT PEELE, RUBY PEELE WILLIAMS AND HUSBAND, HULON WILLIAMS, WILLIAM ROGER PEELE AND WIFE, NELLIE SMITH PEELE, MILDRED PEELE MORRIS AND HUSBAND, WALTER C. MORRIS, AND GRETCHEN PEELE WHITAKER AND HUSBAND, MERLE WHITAKER v. WILSON COUNTY BOARD OF EDUCATION AND W. E. EDWARDS

No. 817SC680

(Filed 6 April 1982)

**1. Deeds §§ 12.1, 16.2— fee on condition subsequent not created—provision repugnant to estate conveyed**

A provision in a 1922 deed after the description stating that the grantee agreed "that if this site is ever abandoned for school purposes . . . the site shall be offered for sale first to" the grantor or his heirs or assigns for a specified price did not create a fee on condition subsequent since it did not contemplate an unconditional right to reenter the premises or to institute an action to terminate the grantee's possessory estate. Furthermore, where the granting clause, habendum and warranty were sufficient to pass fee simple title to the grantee, such provision will be rejected as being repugnant to the estate conveyed.

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**2. Deeds § 21; Vendor and Purchaser § 1— preemptive right—violation of rule against perpetuities**

A provision in a deed stating that "if this site is ever abandoned for school purposes . . . the site shall be offered for sale first to" the grantee or his heirs or assigns for a specified price created a preemptive right which was void as being in violation of the rule against perpetuities.

APPEAL by plaintiffs from *Stevens, Judge*. Judgment filed 12 May 1981 in Superior Court, WILSON County. Heard in the Court of Appeals 4 March 1982.

The sole issue on appeal involves the construction of a deed conveying a tract of land to defendant school board. Plaintiffs are the heirs of the grantors, R. B. Peele and wife. The date of the conveyance was 20 April 1922. The granting clause reads as follows:

That said R. B. Peele and wife in consideration of Seven Hundred and Fifty Dollars to them paid by said Board of Education the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell and convey to said County Board of Education and their successors in office a certain tract or parcel of land in Wilson County . . .

The habendum clause reads:

TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging to the said County Board of Education and their successors in office to their only use and behoof forever.

The warranty clause reads:

And the said R. B. Peele and wife covenant with said County Board of Education and their successors in office that they are seized of said premises, in fee, and have the right to convey in fee simple . . .

Of particular interest, however, is the following clause which appears in the deed immediately after the description of the property conveyed and before the habendum clause:

(It is agreed by the County Board of Education that if this site is ever abandoned for school purposes that the site shall be offered for sale first to R. B. Peele or his heirs or as-



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signs at the purchase price herein named; then in case said Peele or his heirs or assigns do not care to purchase this school site at the price above named, then the county Board of Education may sell the same to any other person or persons at such price as they may consider reasonable and just)

Plaintiffs instituted this action in an effort to establish ownership of the property. The parties stipulated that the defendant school board abandoned the property for school purposes shortly after the 1977-78 school year and soon afterwards received notification of plaintiffs' intention to purchase the property for \$750. Defendant, however, offered the property for sale at public auction. Before final sale, plaintiffs obtained a restraining order preventing further sales of the property pending trial of the issues raised in the complaint.

Trial was held without a jury and the court concluded that "[t]he granting clause, the habendum and the covenants of warranty in the deed are consistent and harmonious and, therefore, conveys [sic] a fee simple title. The paragraph in parentheses is repugnant to the fee simple estate conveyed and is rejected." The court also concluded that "G.S. 39-1.1(a) has no application in the case before the Court because the deed . . . was executed and delivered prior to January 1, 1968"; and "[t]he paragraph in parentheses . . . could not be more than an option or right of 'first refusal' running to the Grantors or their heirs . . . to repurchase" which "must be fixed and is limited to a period within the rule against perpetuities." The court found the right to repurchase "fatally vague."

From the judgment in favor of the defendant school board, plaintiffs appeal.

*Kirby and Clark, by J. Russell Kirby, and Kirby, Wallace, Creech, Sarda & Zaytown, by David F. Kirby and Peter J. Sarda, for plaintiff appellants.*

*Rose, Jones, Rand & Orcutt, by Z. Hardy Rose, for defendant appellee Wilson County Board of Education.*

MARTIN (Harry C.), Judge.

Plaintiffs contend that the manifest intention of the grantors in the deed to the school board limited the conveyance to a grant

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of less than fee simple and that "the trial judge erred by failing to consider all parts of the deed in determining the estate conveyed." Plaintiffs argue that the plain and express words indicate that the Peeles intended to grant a fee on condition subsequent.

[1] Assuming, arguendo, that we adopt plaintiffs' position that the conditional provision in the deed must be given weight as an expression of the grantors' intent, we cannot agree that the provision has the effect of preserving in the grantors a right of entry for condition broken.

The future interest in real property known as the right of entry for condition broken arises after the creation of the possessory estate known as the fee simple estate subject to a condition subsequent. Typical language for the creation of a fee simple subject to a condition subsequent specifies that a grantee or devisee shall have a fee simple estate "on condition that," "provided that," but "to be null and void if" a certain event occurs, or to be forfeited upon the happening or failure of continuance of certain facts. *This interest is the retention of a "right," or more accurately a "power," to re-enter the premises or to institute an action to terminate the grantee's or devisee's possessory estate when the forfeiting event occurs.*

Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry*, 42 N.C.L. Rev. 807, 810 (1964) (emphasis ours).

The provision upon which plaintiffs rely to establish their right to the property in question contemplates not an unconditional right to reenter the premises or even to institute an action to terminate the defendant school board's possessory estate, but rather gives them a preemptive right to purchase the property for a specified amount of money upon certain conditions. The language is inconsistent with any purported intent of the grantors to retain an interest in the property conveyed.

However, we reject plaintiffs' contention for more compelling reasons. The facts of this case fall squarely within the rule enunciated in *Artis v. Artis*, 228 N.C. 754, 761, 47 S.E. 2d 228, 232 (1948), that "where the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the

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granting clause and *habendum*, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected." See also *Whetsell v. Jer-nigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976); *Kennedy v. Kennedy*, 236 N.C. 419, 72 S.E. 2d 869 (1952).

We agree with plaintiffs that the above-mentioned rule is one of construction and not one of law, and that it does not place an absolute bar to a consideration of the grantors' intent. At the threshold of plaintiffs' argument is that the use of words "successors in office" renders the language in the deed less than clear to convey an estate in fee simple, thus requiring the court to look beyond the language to ascertain the grantors' intent. This contention was considered in *College v. Riddle*, 165 N.C. 211, 81 S.E. 283 (1914), in which the Court stated:

The original charter makes provision that it is to establish a female college, and for that purpose, among other things, may take, receive, and hold property, real and personal, which may be conveyed to said corporation or to said trustees and their successors for the use and benefit of the same, etc., and it is held with us and by the weight of authority elsewhere that the words of this *habendum* do not have the effect contended for by the defendant, appropriating the specific property to school purposes, under condition subsequent, but, unless there is imperative and express provision to the contrary . . . these and words of similar import shall be held to express only the purpose of the grantor in making the deed, and that as to third persons the power of the trustees or other corporate authority to convey the property is not impaired.

*Id.* at 216-17, 81 S.E. at 285.

In light of the foregoing, a reading of the *Peele* deed discloses that the words of the granting clause, the *habendum* clause, and the warranty are fully sufficient to pass fee simple title to defendant school board. We see no reason to strain the rules of construction by journeying beyond the four corners of the deed in a mission of exploration into the realm of intent.

[2] Plaintiffs next contend that the trial court erred in concluding that the rights of the grantors to purchase the property were vague or void for violating the rule against perpetuities.

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**Peele v. Board of Education**

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The law with respect to preemptive rights has most recently been enunciated in *Smith v. Mitchell*, 301 N.C. 58, 269 S.E. 2d 608 (1980). With respect to the duration of the right the Court wrote: "We believe the better rule is to limit the duration of the right to a period within the rule against perpetuities and thus avoid lengthy litigation over what is or is not a reasonable time within the facts of any given case." *Id.* at 66, 269 S.E. 2d at 613. In order to avoid a violation of the rule against perpetuities, the property interest must vest, if at all, within a life-in-being plus twenty-one years. Thus, the preemptive right in the deed sub judice violates the rule; that is, there was the possibility at the time of the conveyance that the school board would continue to use the property for school purposes well beyond the time limit set by the rule.

Plaintiffs, however, contend that their rights should be determined in light of *Joyner v. Duncan*, 299 N.C. 565, 264 S.E. 2d 76 (1980). They rely on the following language: "Due to our holdings . . . application of the wait and see doctrine is not necessary to the decision of this case. Therefore, we will have to wait and see in future decisions of this Court, what application, if any, this doctrine will have in North Carolina." *Id.* at 582, 264 S.E. 2d at 89. Plaintiffs urge us to apply the "wait and see" doctrine in the case sub judice.

We do not foreclose the possibility that, under some set of facts where equity dictates the necessity, our courts may adopt the "wait and see" doctrine; however, the clear import of *Mitchell, supra*, suggests that the doctrine has no place in a preemptive rights setting. The Court in *Mitchell* attempted to establish measurable standards by which a preemptive right could be judged reasonable. It would be anomalous to now hold that we should "wait and see" if the duration of a preemptive right is reasonable. We are, moreover, reluctant to further complicate, by exceptions, the rule our Supreme Court has chosen to adopt as a measuring guide for determining the reasonableness of a time limit on preemptive rights.

There is certainly good reason to limit the option in gross to a relatively short period of time, but the rule against perpetuities is obviously not suited to the commercial transaction. The rule against perpetuities was formulated in the context of donative transfers of family wealth. Lives in being

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plus 21 years has no purpose in the commercial field. It seems that a limit of a specific number of years is called for.

T. Bergin and P. Haskell, *Preface to Estates in Land and Future Interests* 212 (1966).

We are unable to accept plaintiffs' contention that the preemptive right does not violate the rule against perpetuities because the right vested immediately in the grantors and their heirs. "[T]he option to purchase specific land is a contract which creates something in the nature of an equitable *contingent* interest . . ." *Id.* at 211 (emphasis ours). Plaintiffs' interest could not vest until the option was exercised, an event which would not occur until the school board ceased using the property for school purposes, which could occur well beyond the time limit set by the rule. *Mitchell, supra.*

We hold that the trial court's findings of fact were sufficient to support the conclusions of law, and the judgment is affirmed.

Judges MARTIN (Robert M.) and WHICHARD concur.

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JAMES L. OWENS D/B/A OWENS GROCERY v. GREEN VALLEY SUPPLY  
COMPANY, INC.

No. 8125SC702

(Filed 6 April 1982)

**1. Trial § 33.6— misstating a fact in charge to jury—no proper objection—no error**

The trial court did not err in denying plaintiff's motion for a new trial on the ground that the trial judge had misstated a fact in the charge to the jury where the record did not reflect that plaintiff made a proper objection to the trial judge's summary of the evidence, and where a question asked by the jury showed that they recalled the evidence correctly despite the judge's instructions.

**2. Trial § 10.1— court's comment concerning list of items—no error**

In an action concerning merchandise destroyed by fire, the trial judge did not err in stating: "It will take all week to try this case if you go through the list (of items destroyed) item by item and ask detailed questions," where the list of items destroyed by the fire was properly introduced into evidence and shown to the jury.

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**3. Evidence § 49— hypothetical questions—expert witnesses—rulings on questions improper**

The trial court improperly sustained an objection to a properly phrased hypothetical question posed to plaintiff's witness which clearly called for an opinion which he was better qualified than the jury to give. Further, the trial court improperly overruled plaintiff's objection to a question posed by defendant which asked a witness to state his opinion upon whether a "reasonable person" could have foreseen that a fire could originate in bales of either hay or straw by reason of spontaneous combustion, as the question, as phrased, asked the witness for an expert's opinion upon that which the jury would be equally qualified to give; that is, what a "reasonable person" would have foreseen.

APPEAL by plaintiff from *Freeman, Judge*. Judgment entered 5 February 1981 in Superior Court, CALDWELL County. Heard in the Court of Appeals 5 March 1982.

This is a negligence action arising out of the destruction by fire of plaintiff's merchandise and personal property stored in a wooden building, part of which was rented by plaintiff from W. F. Simmons. Plaintiff alleges that the fire was the result of uncured hay being stacked negligently by defendant under a tin roof against the side of the wooden building under conditions which were favorable for spontaneous combustion to ignite the hay. Defendant denies negligence.

The jury found that defendant was not negligent, and plaintiff appeals from the judgment entered upon that verdict.

*Tuttle & Thomas, by Bryce O. Thomas, Jr., for plaintiff-appellant.*

*Patton, Starnes & Thompson, by Thomas M. Starnes, for defendant-appellee.*

HILL, Judge.

In 1973 or 1974, plaintiff rented a portion of a wooden building located behind defendant to store seasonal merchandise for his store and personal property. Plaintiff testified that around 10:00 a.m. on 27 June 1977, he was notified that the building was on fire. The next morning plaintiff saw remnants of organic material which he identified as "uncured hay mixed with some straw."

Jerry Thomas Ennis, who lived across from the wooden building, testified that prior to the fire, he saw a farm trailer with

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bales in it next to the building. Ennis stated that it had rained during the time that the bales were in the trailer and that the bales later were removed from the trailer and stacked under the overhanging roof of the building. Michael Lane Coffey, Fire Chief and Building Inspector for Granite Falls, testified that "the point of origin of the fire is the bale of organic material at the end of the structure." In his opinion, the cause of the fire was spontaneous combustion within one bale of uncured organic material.

Earle Teague, a witness for defendant, testified that defendant "has dealt in straw ever since they have been in business, about nine or ten years." William Hugh Kirby, an employee of defendant at the time of the fire, also testified that defendant had straw for use in landscaping. Upon hearing Coffey state that he thought the fire was caused by the spontaneous combustion of uncured hay, Kirby stated, "I told him that there was no hay, that it was straw, and that to my knowledge you couldn't get spontaneous combustion from dry straw."

Tommy E. Andrews, Caldwell County Agricultural Extension Agent, identified photographs of the organic material found near the wooden building on 27 June 1977 as cured, dry, small grain straw. In his opinion, a reasonable person would not have anticipated that a fire would originate by spontaneous combustion of that material.

[1] The principal contention of plaintiff's first argument is that the trial judge erred in misstating a fact in his charge to the jury, thereby causing the jury to over-emphasize the importance of the misstated fact. The judge charged the jury that "the evidence of the plaintiff tended to show that sometime in June of 1977 that he had merchandise from the store and furniture that he owned . . . stored in a building that he rented from the defendant, Green Valley Supply Company . . ." After the jurors retired to begin their deliberations, they returned to the courtroom with the following question: "We, the members of the jury, would like to know if Mr. Teague, the defendant, had permission from Mr. Simmons, who we understand owns the building—if Mr. Teague had permission to build the shed and stack the hay beside the building?" Counsel for the parties conferred with the trial judge out of the hearing of the jury, and the judge announced that "by stipulation of counsel, in answer to that question, they did in fact

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have permission to build the shed and store the material there." The jury again retired to deliberate and returned with a verdict fifteen minutes later. In an affidavit appended to plaintiff's motion for a new trial, plaintiff's counsel stated that he brought to the trial judge's attention the misstatement in the charge that defendant owned the building. However, the trial record does not reflect this objection.

Plaintiff argues that the stipulated answer "gave implicit approval to the jury to consider that fact—whether the defendant had permission to stack the bales there—as a significant, controlling, case determining fact." We disagree. Plaintiff's argument is mere conjecture. The trial judge told the jurors that they must trust their own recollection of the evidence and be guided exclusively by it. The question asked by the jury shows that they recalled evidence, despite the judge's instructions, that Simmons, not defendant, owned the building. Even so, the trial record does not reflect that plaintiff made a proper objection to the trial judge's summary of the evidence. By failing to do so, plaintiff has waived the objection. *State v. Hammonds*, 301 N.C. 713, 272 S.E. 2d 856 (1981); *Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E. 2d 243, *disc. rev. denied*, 302 N.C. 634, 280 S.E. 2d 449 (1981). This argument is without merit.

[2] In his second argument, plaintiff contends that the trial judge expressed his opinion on plaintiff's evidence of items that were destroyed by the fire. Plaintiff introduced a list of such items which was shown to the jury and began to describe them in detail. After plaintiff began that testimony, the judge said, "It will take all week to try this case if you go through the list item by item and ask detailed questions." Plaintiff argues that this statement "left the impression that this case was not worth taking one week to try, regardless." We find that the list of items destroyed by the fire properly was introduced into evidence and shown to the jury. Under these circumstances, we cannot condemn as error the trial judge's plea for economy of time in plaintiff's examination.

[3] Plaintiff's third argument assigns as error various evidentiary rulings made by the trial judge. Two such rulings were made following objections to hypothetical questions asked of the parties' expert witnesses concerning the foreseeability that spontaneous combustion could occur in the bales.



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Coffey, plaintiff's expert witness, was asked the following question:

Chief Coffey, if the jury should find by the greater weight of the evidence that on June 27, 1977 that Green Valley Supply stored 90 to 100 bales of hay under a roof off a wooden building and that these bales were stacked tightly and they were stacked three to five bales high, and that this organic material within the bales consisted of uncured, low-grade hay, and that it was visible to someone knowledgeable with hay and straw as a merchant such as Green Valley Supply by looking at it with the naked eye, do you have an opinion satisfactory to yourself, assuming these facts to be true, whether or not it was reasonably foreseeable that spontaneous combustion would occur in these bales and could be seen by someone who deals regularly with hay and straw or an employee of Green Valley Supply?

Defendant's objection to this question was sustained. However, defendant's expert witness, Andrews, was asked to assume certain facts and answer the following question: "[D]o you have an opinion satisfactory to yourself as to whether a reasonable person could have anticipated that any fire would originate in any one or more of those bales by reason of spontaneous combustion?" Plaintiff's objection to the question was overruled, and Andrews' opinion was that it would not be reasonable to expect that fire could originate in the bales by reason of spontaneous combustion.

As a general rule, an expert opinion is admissible "where the witness is better qualified than the jury to draw appropriate inferences from the facts." 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 132, p. 425. See *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Effective 1 October 1981, the legislature eliminated the requirement "that expert testimony be in response to a hypothetical question." G.S. 8-58.12. See 1981 N.C. Sess. Laws, c. 543, § 4. However, when the present case was tried, to elicit an expert's opinion, the question (1) should include only such facts that are in evidence, or such facts that the jury may infer from the evidence; (2) the facts should be sufficient on which to base a satisfactory opinion; and (3) the facts should be stated hypothetically. 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 137, pp. 452-53. The opinion elicited by a properly phrased

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hypothetical question is entitled to be considered by the jury as it would the testimony of other witnesses. *See Hedgepeth v. Coleman*, 183 N.C. 309, 111 S.E. 517 (1922); *see also* 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 126, pp. 394-95.

The question posed to Coffey clearly called for an opinion which he is better qualified than the jury to give. The question stated hypothetical facts, sufficient on which to base a satisfactory opinion, which were in evidence or which could be inferred from the evidence by the jury. It therefore was error for the trial judge to sustain defendant's objection to the properly phrased hypothetical question and exclude Coffey's opinion.

In addition, we find error in the trial judge's ruling which allowed Andrews to state his opinion upon whether a "reasonable person" could have foreseen that a fire could originate in the bales by reason of spontaneous combustion. The question, as it is phrased, asks Andrews for an expert's opinion upon that which the jury would be equally qualified to give; that is, what a "reasonable person" would have foreseen. Thus, the expert opinion elicited by this question does not survive the test of admissibility.

We do not discuss the matters brought forward by plaintiff's other assignments of error as they may not recur in the new trial.

For errors committed by the trial judge, we grant a

New trial.

Judges WELLS and BECTON concur.

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**Kaplan School Supply v. Henry Wurst, Inc.**

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KAPLAN SCHOOL SUPPLY CORPORATION, PLAINTIFF v. HENRY WURST, INC., HENRY WURST, INC.—RALEIGH AND H. R. WURST, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. PRECISION SERVICE AND SUPPLY, INC., AND PRECISION GAMES, INC., THIRD-PARTY DEFENDANTS

No. 8121SC667

(Filed 6 April 1982)

**Constitutional Law § 24.7; Process § 9.1—foreign corporations—personal jurisdiction—insufficient minimum contacts**

The third-party defendants had insufficient contacts with North Carolina to permit the courts of this State to assert *in personam* jurisdiction over them in an action to recover damages for the allegedly defective printing, binding and mailing of plaintiff's sales catalogs where the third-party defendants are foreign corporations which carry on no activity whatsoever in North Carolina; their contract to prepare plaintiff's sales catalogs was solely with the third-party plaintiff, a Missouri corporation, and the payment for their work was to be from the third-party plaintiff; the binding, printing and addressing of the catalogs was done by third-party defendants solely in Iowa for the Missouri third-party plaintiff; and the plaintiff had no contact whatsoever with the third-party defendants.

APPEAL by third-party defendants from *Wood, Judge*. Order entered 23 April 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 3 March 1982.

This appeal arises out of the denial of third-party defendants' motion to dismiss, for lack of personal jurisdiction, the third-party complaint filed against them.

The relevant facts disclosed by the record are as follows:

Plaintiff Kaplan School Supply, which is not a party to this appeal, is a North Carolina corporation with its principal place of business in Forsyth County. Defendant, third-party plaintiff Henry Wurst, Inc. is a Missouri corporation with its principal place of business in Missouri. Defendant, third-party plaintiff Henry Wurst, Inc.—Raleigh, is a North Carolina corporation with its principal place of business in North Carolina. Third-party defendant Precision Service and Supply is incorporated in Nebraska and maintains its principal place of business in Council Bluffs, Iowa. Third-party defendant Precision Games is an Iowa corporation with its principal place of business in Council Bluffs, Iowa.

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Plaintiff entered into a contract with defendants whereby defendants would print, assemble, affix address labels to, and mail or ship plaintiff's sales catalogs. Defendant, third-party plaintiff Henry Wurst, Inc. subcontracted with the third-party defendants whereby the third-party defendants agreed to print the catalog covers, bind the catalogs, affix the address labels to the catalogs, and mail or ship them.

On 2 January 1980, plaintiff filed a complaint against defendant Henry Wurst, Inc.—Raleigh and Henry Wurst, Inc., seeking damages in tort and for breach of contract pertaining to the allegedly defective preparation of plaintiff's sales catalogs. Defendants answered and filed a third-party complaint against the third-party defendants, seeking indemnity and reimbursement from the third-party defendants for any sums that might be adjudged against defendants in favor of plaintiff Kaplan School Supply as a result of plaintiff's tort and contract action. On 20 March 1980, third-party defendants moved to dismiss the third-party complaint on the grounds that third-party defendants were not subject to *in personam* jurisdiction in North Carolina.

Third-party defendants have never qualified to do business in, had an office in, or appointed an agent for service of process in the State of North Carolina. They have never owned assets in, solicited any business in, conducted any sales activity in, or advertised in the State of North Carolina. They have never paid any tax to or filed a corporate tax return with the State of North Carolina. Third-party defendants are in the business of doing printing, binding, and mailing work for other printing companies, pursuant to subcontracts. Third-party defendants have never contracted with any company located in North Carolina to do any kind of printing, binding, or mailing work.

Defendant, third-party plaintiff Henry Wurst, Inc. (hereinafter referred to as the "Missouri third-party plaintiff") made the initial contact with third-party defendants with respect to the formation of the subcontract to prepare and mail plaintiff's sales catalogs. This contact was a call from the Missouri third-party plaintiff, from its offices in Missouri, to the offices of third-party defendants in Iowa. During the negotiations for the subcontract, third-party defendants never had any dealings with plaintiff Kaplan and never entered North Carolina to negotiate or discuss

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**Kaplan School Supply v. Henry Wurst, Inc.**

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the contract. Third-party defendants' negotiations for the subcontract were held solely with the Missouri third-party plaintiff, and the subcontract was solely between the Missouri third-party plaintiff and third-party defendants.

Pursuant to their subcontract with the Missouri third-party plaintiff, third-party defendants shipped unbound catalog material from third-party plaintiff's Missouri offices to Iowa, where third-party defendants bound the printed material, printed the catalog covers, and affixed the address labels to the finished catalogs. Of those catalogs, some were loaded on postal trailers brought to third-party defendants' Iowa plant and provided by the post office; these catalogs were to be mailed to their designated addresses, and 7,326 were to be mailed to addresses in North Carolina. Other catalogs, numbering 38,117, were loaded on commercial trucks in Iowa and shipped to plaintiff Kaplan in North Carolina. Earlier, samples of the completed catalogs were sent via air freight by third-party defendants to plaintiff Kaplan. No one from the third-party defendants left Iowa or entered North Carolina to deliver the catalogs. Third-party defendants' shipping instructions came from the Missouri third-party plaintiff and the only revenues third-party defendants anticipate from their work on the subcontract is payment they hope to receive from the Missouri third-party plaintiff.

The trial court, "after having reviewed and considered the pleadings, motion, affidavits, depositions and answers to interrogatories filed by the parties," made findings of fact and conclusions of law, including the following:

By contracting to print and bind the catalogs of a North Carolina business, to send samples of the catalog to the North Carolina business in Winston-Salem, North Carolina, to mail thousands of copies of the catalog to North Carolina addresses and to ship to the Plaintiff in North Carolina a substantial quantity of the catalogs, the Third Party Defendants have the necessary "minimum contacts" with North Carolina to support the exercise of personal jurisdiction over them by this Court in an action based upon a claim arising from those contacts.

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**Kaplan School Supply v. Henry Wurst, Inc.**

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The trial court thereupon denied the third-party defendants' motion to dismiss for lack of personal jurisdiction. Third-party defendants appealed.

*Womble, Carlyle, Sandridge & Rice, by Jimmy H. Barnhill and Francis C. Clark, for third-party plaintiff appellees.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by C. T. Leonard, Jr. and Reid L. Phillips, for third-party defendant appellants.*

HEDRICK, Judge.

The sole question presented by this appeal is whether the trial court erred in denying third-party defendants' motion to dismiss the third-party complaint for lack of personal jurisdiction.

The resolution of the question of *in personam* jurisdiction involves a two-fold determination: (1) do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against third-party defendants, and (2) does the exercise of this power by the North Carolina courts comport with due process of law. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Both questions must be answered in the affirmative before *in personam* jurisdiction may be asserted over a nonresident defendant.

"The first of these considerations is easily met." *Mabry v. Fuller-Shuwayer Co.*, 50 N.C. App. 245, 248, 273 S.E. 2d 509, 511, *disc. rev. denied*, 302 N.C. 398, 279 S.E. 2d 352 (1981). G.S. § 1-75.4, commonly referred to as the "long-arm" statute, is a legislative attempt to allow the courts of this State to assert *in personam* jurisdiction to the full extent permitted by the Due Process Clause of the United States Constitution, and is accorded a liberal construction in favor of finding personal jurisdiction, subject only to due process limitations. *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E. 2d 476 (1980); *Dillon v. Numismatic Funding Corp.*, *supra*. Since the requisite statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the assertion thereof comports with due process. *Mabry v. Fuller-Shuwayer Co.*, *supra*; *Phoenix America Corp. v. Brissey*,

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*supra*; *Parris v. Garner Commercial Disposal, Inc.*, 40 N.C. App. 282, 253 S.E. 2d 29, *disc. rev. denied and appeal dismissed*, 297 N.C. 455, 256 S.E. 2d 808 (1979).

The due process clause makes the exercise of personal jurisdiction over a defendant contingent on there being some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979). "Due process requires that a nonresident defendant have certain minimum contacts with the forum state such that the maintenance of the suit [in the forum state] does not offend 'traditional notions of fair play and substantial justice.'" *Phoenix America Corp. v. Brissey*, *supra* at 530, 265 S.E. 2d at 479.

In the present case, third-party defendants carry on no activity whatsoever in North Carolina. They have never contracted with any company located in North Carolina to do any kind of printing, binding, or mailing work. Their contract to prepare plaintiff's sales catalogs was solely with the Missouri third-party plaintiff, and the payment for their work was to be from the Missouri third-party plaintiff. The binding, printing, and addressing of the catalogs was done by third-party defendants solely in Iowa for the Missouri third-party plaintiff. The plaintiff, Kaplan, insofar as this record discloses, had no contact whatsoever with the third-party defendants. Indeed, there is nothing in this record to indicate that Kaplan knew or had reason to know that the Missouri third-party plaintiff had subcontracted any part of the work to anyone. There is no reason on this record for the North Carolina courts to exercise personal jurisdiction over the third-party defendants and become involved in a controversy which is solely between residents of two foreign states. Hence, as in *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 625, 263 S.E. 2d 859, 864, *disc. rev. denied*, 300 N.C. 373, 267 S.E. 2d 677 (1980), the third-party defendants' "connection with the State of North Carolina is far too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon [them] the 'burden and inconvenience' of defense in North Carolina."

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We hold that the trial court erred in denying third-party defendants' motion to dismiss the third-party complaint for lack of *in personam* jurisdiction.

Reversed and remanded.

Chief Judge MORRIS and Judge VAUGHN concur.

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STATE OF NORTH CAROLINA v. JON LEE BRIDWELL

No. 8115SC906

(Filed 6 April 1982)

**1. Rape and Allied Offenses § 4.3— evidence of victim's use of birth control pills—evidence that victim told defendant of use—properly excluded**

Under G.S. 8-58.6, the trial court did not err in excluding testimony that the victim was using birth control pills at the time of the alleged rape. Further, from the record, the Court can find no prejudicial error in the court's refusal to allow evidence that the prosecuting witness told defendant, during the time of the incident, that she was using birth control pills.

**2. Rape and Allied Offenses § 4— corroborating testimony by officer**

The trial court did not commit prejudicial error by allowing a police officer to testify that the prosecuting witness had told him that "the only thing that kept running through her mind was a scene from a movie which she had seen named 'Looking for Mr. Goodbar' in which a girl was killed in a similar situation." The evidence was admissible to corroborate testimony of a previous witness.

**3. Rape and Allied Offenses § 5— second degree rape—sufficiency of evidence**

Where the evidence taken in the light most favorable to the State established all the elements of second degree rape, the trial court did not err in failing to grant defendant's motion for nonsuit.

**4. Criminal Law § 99.11— court's comment to jury—no error**

The trial court did not err in stating to the jury before the arguments of counsel that he had earlier stated "the defendant would have an opportunity to present evidence, but whether he did so or not was up to him."

APPEAL by defendant from *McLelland, Judge*. Judgment entered 7 January 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 4 February 1982.

The defendant appeals from a conviction of second degree rape and a maximum prison sentence of eight years.



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*Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.*

*Raiford & Harviel, by R. Chase Raiford, for defendant appellant.*

BECTON, Judge.

The defendant brings forth six arguments on this appeal: (1) that the trial court erred when it applied the rape victim shield statute to evidence concerning the use of birth control pills by the prosecuting witness; (2) that the trial court erred in allowing into evidence statements made by the prosecuting witness to an investigating officer when the statement included new evidence not testified to by the prosecuting witness; (3) that the trial court erred in refusing to allow defendant's motions for dismissal at the close of the State's evidence; (4) that the trial court erred in commenting to the jury that the defendant had a right to present evidence but had elected not to do so, without further instructions that such an election should not prejudice him in any way; (5) that the trial court erred in its instruction to the jury that the defendant could be found guilty even if they found that the prosecuting witness could have resisted the defendant; and (6) that the trial court improperly expressed its opinion on the merits of the case in its instructions to the jury. We conclude that defendant's trial was free of prejudicial error. Our analysis follows.

I

The defendant's conviction arises from an alleged rape of an 18-year old Elon College freshman on 5 September 1980. The victim had gone to the Ramada Inn Motel in Burlington to attend a dance. While at the dance, she met the defendant for the first time, after which she danced and had drinks with him. Thereafter, the two left the dance hall and went outside to talk. "While we were sitting there, he asked me if I would like a beer and I said yes, sure; so we walked to his room. He just opened the door and he walked in and I left the door open."

From this point on, the evidence from the parties is in conflict. The evidence from the State tends to show the following.

After entering the room, the prosecuting witness sat on the bed; the defendant went to the bathroom but returned without

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beer and with no shoes on; the two of them sat on the bed and watched TV for a while, during which time the defendant attempted to kiss her. After the kissing attempt, the prosecuting witness started to leave the room but was prevented from doing so by the defendant. The defendant clasped his hand over her mouth and pushed her onto the bed. The prosecuting witness was told to take her pants off or someone would get hurt. The defendant ended up disrobing her from the waist down. The prosecuting witness, afraid for her safety at this time, pleaded to go to the bathroom, which she was allowed to do. While inside the locked bathroom, she contemplated things to do but was primarily concerned that anything she attempted would anger the defendant and thereby increase the danger to herself. She, therefore, went back into the room where she was pushed back onto the bed and was thereafter sexually assaulted by the defendant. She managed to escape when he collapsed. The prosecuting witness reported the incident to her friends and later to the police.

The defendant presented no evidence, nor did he testify on his own behalf. Evidence of the defendant's version of the incident was introduced by the State, in the form of testimony by Lieutenant Jerry Barbee of the Burlington Police. As related by Lt. Barbee, the defendant's story tends to show the following.

The defendant met the prosecuting witness at the dance, danced with her, had some beer with her and then left the lounge area in order to take a walk and get some air. After leaving the lounge area, they went to his room. The television was not on, and they were on the bed talking and began to kiss. He stated to the prosecuting witness that he was tired and sleepy and was ready to go to bed. After disrobing, he got under the covers to go to sleep. Soon afterwards he was joined by the prosecuting witness who had also disrobed. They thereafter had sexual intercourse. Some conversation followed and the prosecuting witness later got up, dressed, and left.

## II

[1] The defendant challenges the constitutionality and the application of G.S. 8-58.6, the Rape Shield Statute, to his case. We readily dispose of his constitutional argument on the authority of *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980). There, our Supreme Court held that the statute did not deny the defendant

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his Sixth Amendment right to confront a witness. The Court upheld the statute stating that (1) "there [was] no constitutional right to ask a witness questions that are irrelevant;" (2) that the statute was "primarily procedural and does not alter any of defendant's substantive rights;" and (3) that the statute was supported by "valid policy reasons, aside from relevance questions. . . ." *Id.* at 35-36, 269 S.E. 2d at 112.

The Court went on to say that the statute was "nothing more . . . than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims." *Id.* at 37, 269 S.E. 2d at 113. "[Evidence] is relevant if it reasonably tends to establish the probability or the improbability of a fact in issue." *Freeman v. Ponder*, 234 N.C. 294, 304, 67 S.E. 2d 292, 300 (1951). If the probative value of the evidence is outweighed by its prejudicial effects, the evidence is to be excluded. *Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966).

In the case *sub judice*, the State moved, out of the presence of the jury, to exclude introduction of evidence that the victim was using birth control pills at the time of the alleged rape. After hearing arguments from counsel for both sides, the court ruled that evidence of the use of contraceptive pills was evidence of sexual activity and that it was excluded by G.S. 8-58.6. That may be true, and with this ruling, we have no quarrel. After this ruling, counsel for defendant inquired of the court if evidence that the prosecuting witness had told defendant, during the time of the incident, that she was using birth control pills could be introduced by direct evidence from the defendant. This request was denied. On this particular point we find no prejudicial error.

It is quite probable that a statement by a prosecuting witness to a defendant that she was using birth control pills may be relevant on a fact situation similar to this one. That is, if a prosecuting witness were to make such a statement to a defendant and then disrobe and follow him into bed as the defendant maintains was done here, it would seem to us that the evidence would be relevant on the issue of consent. We cannot say as much for this trial, however. The defendant did not tender evidence at the *voir dire* hearing showing the context of the statement. We are unable to determine from the record what the testimony would have been or what the circumstances surrounding the

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statement were. Such information is critical to our review. The lack of evidence on the circumstances surrounding which the alleged statement was made prevents us from finding any prejudice to the defendant. As was stated in *State v. Milano*, 297 N.C. 485, 497, 256 S.E. 2d 154, 161 (1979), "we cannot tell whether the court's ruling prejudiced the defendant in any way." Consequently, we overrule this assignment of error.

**III**

[2] The defendant next argues that the court erred when it allowed the police officer to testify that the prosecuting witness had told him that "the only thing that kept running through her mind was a scene from a movie which she had seen named 'Looking for Mr. Goodbar' in which a girl was killed in a similar situation." We find no prejudicial error.

Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury. *State v. Case*, 253 N.C. 130, 136, 116 S.E. 2d 429, 433 (1960), *cert. denied* 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961). The testimony by Officer Barbee does contain the additional sentence above, the import of which is no different from what the witness had testified to earlier. Our courts have held that slight variances in original and corroborating testimony do not render the evidence inadmissible. *State v. Bryant*, 282 N.C. 92, 97, 191 S.E. 2d 745, 749 (1972), *cert. denied sub nom White v. North Carolina*, 410 U.S. 958, 35 L.Ed. 2d 691, 93 S.Ct. 1432 (1973). Any possibility of prejudice was reduced by the court's elaborate instruction on corroboration evidence. This assignment of error is overruled.

**IV**

[3] The defendant next contends that the trial court erred when it denied defendant's motion for nonsuit at the end of the State's evidence. We summarily dismiss this assignment as the law is clear: On a motion for nonsuit, the court is to consider the evidence in the light most favorable to the State and every inference which can be drawn therefrom. If the evidence and inferences establish all of the elements of the offense charged, the motion for nonsuit must be denied. *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974). The evidence here, taken in the

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light most favorable to the State, established all of the elements of second degree rape.

V

[4] The defendant's next assignment of error is that the trial court erred in commenting to the jury that the defendant had no duty to present evidence without further telling them that such a decision should not prejudice him in any way. We do not disagree with the defendant that a trial court is required to instruct the jury that the defendant's choice not to present evidence or testify in his behalf should not be held against him. We do not agree with the defendant's argument on the facts of this case, however. In the present case, the court's comment to the jury was no more than an explanation to the jurors of the stage of the proceedings. The court's comments are set out below, and they clearly show that the court did not err.

Members of the jury, I will ask you next to listen to the arguments that counsel will make you. You remember I mentioned earlier (that the defendant would have an opportunity to present evidence, but whether he did so or not is up to him. He has elected not to do so and the hour is such that we cannot finish this afternoon.) [S]o I told them I'll let them do their arguments seriatim in the morning and that gives you a little early break today.

VI.

The defendant's last two assignments involve the court's instruction to the jury which is set out below:

Please note that the proof of guilt required by the law does not include proof that [the prosecuting witness] exercised sound judgment or conducted herself in such a fashion that there would have been no opportunity for defendant to have sexual intercourse with her. If you find beyond a reasonable doubt that the defendant had sexual intercourse with her by force and against her will, though you also find that that would have [sic] have occurred had she not gone to the defendant's room or, having gone, had fled at defendant's first advance or had kept herself locked in the bathroom or had screamed or had otherwise offered resistance, your duty would be to return a verdict of guilty.

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We find no error in the court's charge. Even though the language used may be unusual, the defendant was not prejudiced since the court repeatedly charged the jury that they had to find, beyond a reasonable doubt, that defendant raped the prosecuting witness.

For the foregoing reasons, we find

No error.

Judge HEDRICK and Judge HILL concur.

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STATE OF NORTH CAROLINA v. RICHARD CHARLES DOWLESS

No. 8130SC996

(Filed 6 April 1982)

**1. Criminal Law § 75.11— in-custody statement—waiver of right to counsel**

Even if defendant initially invoked his right to counsel when he asked the interrogating officer if he could provide him with an attorney and the officer responded that he could not do this but that defendant could telephone an attorney, defendant subsequently waived counsel by informing the officer that he would respond to those questions which he desired to answer.

**2. Criminal Law § 57— foundation for ballistics testimony**

A proper foundation was laid for opinion testimony by an expert in the field of firearms that bullet fragments removed from a murder victim's head were fired from a pistol which was taken from defendant where the witness gave a detailed description of the tests performed by him which formed the basis for his opinion.

**3. Homicide § 21.7— second degree murder—sufficiency of evidence**

The State's evidence *aliunde* defendant's confession was sufficient to support conviction of defendant for second degree murder where a neighbor testified that he saw defendant arrive at the victim's house around 8:00 p.m. on a certain date and leave fifteen or twenty minutes later; a pathologist fixed the time of death as occurring on that date between 6:00 p.m. and 8:00 p.m.; another witness testified that some time after midnight defendant told him that he had killed someone and pointed a pistol at the witness, and that the witness wrestled the pistol from the defendant and later turned it over to the authorities; and a firearms expert testified that in his opinion bullet fragments removed from the victim's body were fired from this pistol.

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APPEAL by defendant from *Sitton, Judge*. Judgment entered 15 May 1981 in Superior Court, JACKSON County. Heard in the Court of Appeals on 1 March 1982.

Defendant was charged in a proper bill of indictment with the first degree murder of Bonnie Buchanan. The jury found defendant guilty of second degree murder. From a judgment imposing a prison term of 60 years maximum and 50 years minimum, defendant appealed.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Lemuel W. Hinton, for the State.*

*Creighton W. Sossomon, for defendant appellant.*

HEDRICK, Judge.

[1] Defendant assigns as error the trial court's denial of his motion to suppress an alleged confession. Prior to trial defendant filed this motion to suppress evidence of statements made by him following his arrest on 31 January 1981. He alleged that the statements were taken after he had requested counsel, that this request was ignored by law enforcement officials, and that he never knowingly withdrew his request. At the *voir dire* hearing on this motion, Dan Crawford, an S.B.I. agent, testified that he saw defendant at the Rutherford County Jail at approximately 5:05 p.m. on 31 January 1981. In Crawford's opinion, defendant "was in full possession of his faculties." Crawford read defendant his *Miranda* rights, and defendant indicated he understood them. Crawford testified further:

I then asked him [defendant] if he would sign the written waiver. He then asked me if I would be able to provide him an attorney today, and I instructed him that I was not able to be the one to provide him with an attorney today through the courts. At that time I advised him that I was not able to call an attorney, that there was a telephone on the desk and a telephone book, and he stated he did not want to call an attorney.

He first refused to sign the waiver, and by the statement he made then it implied to me that he wanted an attorney.

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Then, he said he did not want to make a written statement and sign it, and I asked him if he was willing to talk to me on the condition that if he did not want to answer any particular question he could refuse to do so. He said he understood this, and he would talk to me without an attorney present, and I again handed him the rights form, and at that time he signed it.

. . .

This form was signed January 31, 1981, a short time after 5:05 p.m.

On this exhibit [waiver of rights form] appears the question "Do you want a lawyer?" and following that in the blank line appears the word "yes" which was written in and then marked through. It was marked through by me. This is my handwriting. I did this after Mr. Dowless questioned me about appointing him a lawyer, and after I had advised him that I could not and had given him the opportunity to make a phone call. He then stated he would talk to us on the condition that he could answer only those questions which he wanted and refused to answer those he did not wish to answer. At that point he signed the waiver of rights. I struck out the word "yes" prior to the time that this exhibit was handed to the defendant and prior to the time that he signed it.

The entire conversation took approximately 1 hour and 45 minutes. During this time, no threats were made by myself or Sheriff Holcombe to induce the defendant to make a statement. No promises were made by either myself or Sheriff Holcombe to the defendant.

Defendant's *voir dire* testimony tends to show that on the evening of 30 January 1981 he was arrested for driving under the influence and placed in the Rutherford County Jail. On the following day Crawford informed him that he was not under arrest for the murder of Ms. Buchanan and read him his *Miranda* rights. Defendant then asked for a lawyer. He signed the rights form after Crawford informed him that a lawyer could not be "gotten and that was it." Defendant verified the statement allegedly made by him after Crawford indicated that his brother was being held



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in custody. After hearing the *voir dire* testimony, the trial court made detailed findings of fact consistent with the State's evidence and concluded, *inter alia*, that defendant "freely, knowingly, intelligently and voluntarily waived each of his Constitutional rights."

Defendant argues in his brief that the court's findings of fact are not supported by the evidence as it is interpreted by the law, particularly by that promulgated in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981). We disagree. In *Edwards*, the defendant was arrested on 19 January 1976 and asserted his right to counsel and his right to remain silent. Without furnishing defendant an attorney, policemen confronted him the next morning. As a result of this confrontation, defendant made incriminating oral admissions. The Court held:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.  
[Footnote omitted.]

451 U.S. at 484-85, 101 S.Ct. at 1884-85, 68 L.Ed. 2d at 386. In the case *sub judice*, it is not even clear that defendant invoked his right to counsel. Defendant merely asked Agent Crawford if he could provide him with an attorney. Crawford responded that he could not do this but that defendant could telephone an attorney. Defendant then indicated that he did not wish to call an attorney. Even if defendant did initially invoke his right to counsel, he subsequently waived counsel by informing Crawford he would respond to those questions he desired to answer. This waiver was also knowingly and intelligently given. Defendant testified on *voir dire* that he understood how a lawyer is appointed to represent a defendant because one had been appointed for him when he had been jailed in the past, that he understood his *Miranda* rights, and that no one threatened or made any promises to him. Since

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the trial court's findings of fact are supported by this evidence offered on *voir dire*, they will not be disturbed on appeal. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). The findings of fact, in turn, support the conclusion that the defendant's statements were made voluntarily and knowingly.

Defendant also assigns as error the admission into evidence of certain testimony given by Agent Crawford. Crawford testified that defendant informed him that immediately prior to his shooting Ms. Buchanan, he obtained a pistol from the nightstand beside his bed. Crawford admitted that this statement was not part of the notes made by him during his 31 January 1981 interview with defendant. Instead, this statement was recorded in notes Crawford made on 27 April 1981 at the request of the District Attorney. Defendant argues that the State was limited to the contents of the notes taken by Crawford during the 31 January 1981 interrogation; and that the admission of this testimony concerning the whereabouts of the pistol "can hardly be characterized as 'harmless' or consistent." We fail to see how defendant possibly could have been prejudiced by this testimony. In the notes recorded on 31 January 1981 and allegedly verified by defendant, he informed Crawford that he began working for Ms. Buchanan as her housekeeper in December of 1980. The notes further indicate that defendant planned to visit his father in Fayetteville on the evening of 30 January 1981; that Ms. Buchanan did not want him to leave; that she threatened to call the sheriff and that as she was trying to call, he shot her in the face with a .22 caliber pistol. In light of this evidence and our determination of its admissibility, we conclude that the location of the pistol carried little if any weight in the jury's deliberation of defendant's guilt or innocence.

[2] During the trial, Agent Douglas Branch was accepted by the court as an expert in the field of firearms and tool mark identification. Defendant has assigned error to Branch's opinion testimony that the bullet fragments removed from Ms. Buchanan's head were fired from the pistol which was taken from defendant's possession on the evening of 31 January 1981. Defendant contends that a proper foundation was not laid before this testimony was admitted. Specifically there was no evidence that Branch performed tests upon which his opinion testimony was based. The testimony of Branch totally refutes defendant's con-

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tentions. Branch gave a detailed description of the tests he performed. When the facts upon which an expert bases his opinion are within his own knowledge, the expert may relate these facts and give his opinion. Also the trial judge has the discretionary power to allow the expert to give his opinion first and then leave the facts to be elicited on cross-examination. See *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). This assignment of error is therefore overruled.

[3] Defendant further assigns error to the court's denials of his motions for nonsuit made at the close of the State's evidence and at the close of all the evidence. When a motion for nonsuit is made in a criminal action, the trial court must consider all of the evidence in the light most favorable to the State. The court must then determine whether there is a reasonable basis upon which the jury might find that the offense charged in the indictment was committed and that defendant was the perpetrator. *State v. Hyatt*, 32 N.C. App. 623, 233 S.E. 2d 649, *disc. rev. denied*, 292 N.C. 733, 235 S.E. 2d 786 (1977). In the case *sub judice* defendant argues that his motions should have been granted because the State erroneously relied upon defendant's alleged confession in proving its case. The State's evidence, *aliunde* this confession, was sufficient to allow the submission of the case to the jury. A neighbor testified that he saw defendant arrive at Ms. Buchanan's house around 8:00 p.m. on 30 January 1981 and leave fifteen or twenty minutes later. The pathologist, who examined the body, fixed the time of death as occurring between 6:00 p.m. and 8:00 p.m., "give or take two hours." Timothy Hudgins testified that he saw the defendant soon after midnight on 31 January 1981 when defendant stopped and asked directions to Morganton. Defendant told Hudgins he had killed someone and then pointed a pistol at him. Hudgins wrestled the pistol from defendant and later turned the weapon over to the authorities. A firearms expert testified that in his opinion the bullet fragments removed from Ms. Buchanan's body were fired from this pistol. Based on this evidence alone, defendant's motions for nonsuit were properly denied.

Defendant's final assignment of error concerns two instances of alleged expressions of opinion made by the trial judge during his instructions to the jury. We have carefully examined those portions of the charge and find no error. We further note that defendant had the burden of showing a prejudicial effect from

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these alleged expressions and has failed to make such a showing. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979).

We hold defendant had a fair trial free of prejudicial error.

No error.

Chief Judge MORRIS and Judge VAUGHN concur.

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APPEAL OF DONALD BRENT WILLETT FROM THE DECISION OF THE REFUND COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA AT GREENSBORO TO CLAIM HIS NORTH CAROLINA INCOME TAX REFUND UNDER THE SET-OFF DEBT COLLECTION ACT

No. 8114SC713

(Filed 6 April 1982)

**Administrative Law § 4; Taxation § 28.4— Setoff Debt Collection Act—UNC-G not exempt from hearing procedures**

The University of North Carolina at Greensboro is not exempt from the hearing procedures of the Setoff Debt Collection Act, G.S. 105A-8. Therefore, a hearing conducted by the Refund Committee of the University to review the asserted basis for a setoff of a student debtor's delinquent account against his income tax refund should have been recorded and an "official record" of the hearing as set forth in G.S. 150A-37 should have been made.

APPEAL by respondent from *Herring, Judge*. Order entered 27 May 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 March 1982.

*Attorney General Edmisten, by Associate Attorney Lisa Shepherd, for respondent-appellant.*

*Eure & Willis, by Michael W. Willis, for petitioner-appellee.*

HILL, Judge.

In June, 1977, petitioner, then a resident of Kentucky, applied for admission to the University of North Carolina at Greensboro [hereinafter referred to as "UNC-G"]. He was accepted for admission and subsequently was billed for six semester hours at \$156, the in-state tuition rate, which he paid. Petitioner

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enrolled, found it necessary to quit attending classes, and withdrew from UNC-G. Although the deadline to drop courses at UNC-G and still receive a tuition refund was 8 September 1977, petitioner's request to drop the six semester hours was delivered on 5 October.

On 29 November 1977, petitioner received a letter from the Cashier's Office which informed him of an additional charge of \$573, representing the difference between in-state and out-of-state tuition, which was due immediately because petitioner had been erroneously classified as an in-state student. Petitioner appealed the additional charge, but the Refund Committee at UNC-G informed him that the charge was justified. On 25 April 1980, the Cashier's Office informed petitioner that it intended to claim all of his 1979 income tax refund to pay his delinquent account pursuant to the Setoff Debt Collection Act, G.S. 105A-1 to -16. Petitioner then requested a hearing on this matter before the Refund Committee.

Petitioner's hearing was held on 20 June 1980. The minutes of that meeting and the decision of the Refund Committee were recorded as follows:

DATE: Friday, June 20, 1980

TIME: 10:00 a.m.

PLACE: Leon Sartin's Office, Accounting Office

MEMBERS PRESENT: Eleanor Morris, Jerry Harrelson, Leon Sartin

GUESTS: Brent Willett and Carol Sanders

Carol Sanders presented the information on which the University's claim against Mr. Willett's tax refund was based, which was the fact that Mr. Willett had been charged out-of-state tuition for Fall 1977 and paid the in-state rate.

Mr. Willett presented his case which was that he dropped the classes and did not feel that he should have to pay for services he did not receive. He also stated that he was not aware of the residence requirements and the difference in costs.

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The Refund Committee's decision was that there was no additional information presented to reverse the original decision of the Committee which was based on an appeal Mr. Willett made in November of 1977 on this same charge. Therefore, the money is due to UNC-G.

Mr. Willett stated he would be requesting a hearing in his own county. If we have not heard from his legal counsel by July 18, 1980, the Cashier's Office will proceed to certify Mr. Willett's debt to the Department of Revenue.

Respectfully,

s / CAROL M. LAMBERT  
Carol M. Lambert

Petitioner subsequently supplemented this account of the 20 June 1980 meeting.

On 8 September 1980, petitioner petitioned for judicial review of the Refund Committee's decision alleging that he was denied due process of law and that the decision was not supported by "substantial evidence." The trial judge entered an order on 27 May 1981 finding the following facts:

(1) THAT the fact that the hearing of June 20, 1980, was held before a panel made up of three University administrators who are members of the Standing Refund Committee of the University of North Carolina at Greensboro, does not constitute a violation of due process.

(2) THAT no transcript of the June 20, 1980, hearing of petitioner's case by the Standing Refund Committee was prepared or received by this court, and that no other data was presented which was sufficient to relate what took place at the June 20, 1980 hearing.

. . . .

In connection with this, G.S. 150A-47 provides that within thirty (30) days after receipt of the copy of the Petition for Review, or within such additional [sic] as the Court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review.

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(3) THAT the Administrative Procedures [sic] Act requires, as set forth in G.S. 150A-36, that a final decision or order of an agency in a contested case shall be made, after review of the official record as defined in G.S. 150A-37(a) in writing and shall include findings of facts and conclusions of law.

. . . . .

Exhibit L [the minutes of the 20 June 1980 meeting] of the Record of Administrative Proceedings in this is [sic] case contains no written findings of facts on which to support any conclusions of law, nor are there any conclusions of law.

. . . . .

(4) THAT petitioner should have been given a hearing de novo by the Standing Refund Committee on June 20, 1980.

. . . . .

Instead the minutes found in Exhibit L of the Record recite that no additional information was presented by the petitioner to warrant a reversal of the Committee's original decision in January 1978. The Administrative Procedures [sic] Act requires that findings and conclusions be made as a result of a hearing at which there is an opportunity to present evidence.

The judge concluded that "petitioner is not entitled to the relief he seeks," and that "this court has discretion to remand this case to the Standing Refund Committee with directions that proper findings of fact and conclusions of law be stated by the agency pursuant to the provisions of G.S. 150A, after hearing de novo." The trial judge then remanded the case to the Refund Committee and ordered the following:

(2) THAT since this Court has no way of knowing exactly what sort of record was made at the June 20, 1980 hearing nor the contents of any such record, that a hearing de novo be conducted by the Standing Refund Committee in accordance with G.S. 150A and that petitioner be given adequate notice of the time and place of that hearing.

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(3) THAT no prior administrative decision made at any time in this case shall be given any consideration or effect in the hearing de novo, and that petitioner be allowed to present oral evidence, and that an adequate record of that evidence shall be recorded.

. . . . .

(4) THAT the memorandum of decision as stated in the June 20, 1980, "Minutes of the Refund Committee Meeting" be vacated and is hereby set aside.

Respondent appeals from this order.

Respondent's appeal may be decided by our answer to the question of whether UNC-G is specifically exempted from the hearing procedures of the Setoff Debt Collection Act, G.S. 105A-8(a), which provides that "[i]f a claimant agency receives written application of the debtor's intention to contest at hearing the claim upon which the intended setoff is based, *it shall grant a hearing according to procedures established under Chapter 150A, the Administrative Procedure Act, to determine whether the claim is valid.*" (Emphasis added.) G.S. 150A-1(a) of the Administrative Procedure Act provides, in part, as follows:

Article 4 of this Chapter, governing judicial review of final agency decisions, shall apply to the University of North Carolina and its constituent or affiliated boards, agencies, and institutions, *but the University of North Carolina and its constituent or affiliated boards, agencies, and institutions are specifically exempted from the remaining provisions of this Chapter.*

(Emphasis added.)

Of course, in ascertaining the intent in drawing G.S. 105A-8(a) of the Setoff Debt Collection Act, "it is always presumed that the Legislature acted with full knowledge of prior and existing law." *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E. 2d 566, 570 (1977). It is clear that UNC-G, a constituent member of the University of North Carolina, is specifically exempted from the Administrative Procedure Act except for the judicial review provisions of Article 4. We believe that the legislature merely selected those portions of the Administrative Pro-



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**Appeal of Willett**

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cedure Act dealing with hearing procedures and adopted them as the hearing procedures of the Setoff Debt Collection Act. However, this adoption does not mandate a conclusion that UNC-G also is specifically exempted from those procedures under the Setoff Debt Collection Act, although it is so exempted under the Administrative Procedure Act. We therefore conclude that UNC-G is not specifically exempted from the hearing procedures of the Setoff Debt Collection Act.

G.S. 150A-37, which outlines the requirements of an "official record" for the Setoff Debt Collection Act, provides as follows:

(a) An agency shall prepare an official record of a hearing which shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
- (5) Proposed findings and exceptions; and
- (6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests.

Our review of the minutes of the Refund Committee's 20 June 1980 meeting reveals a substantial noncompliance with these requirements. Those proceedings should have been recorded and an "official record" made.

For the reasons stated in this opinion, the order of the trial court is

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**State v. Elam**

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**Affirmed.**

**Judges WELLS and BECTON concur.**

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**STATE OF NORTH CAROLINA v. FLORINE H. ELAM**

**No. 8112SC1007**

**(Filed 6 April 1982)**

**1. Criminal Law § 85— character evidence—excluded testimony cumulative—no error**

There was no prejudicial error in the court's exclusion of character and reputation testimony by a witness where (1) the record did not reflect what the witness would have answered, and (2) other witnesses had testified as to defendant's good character and the testimony would have been cumulative.

**2. Criminal Law § 119— refusal to give requested instruction**

The trial judge did not abuse his discretion in refusing to instruct the jury that it can infer from the State's failure to produce written statements made by eyewitnesses that the statements were damaging to the State's case since there was no intimation that the evidence was destroyed, defendant did not make his motion to produce the statements until immediately before trial, and since although the officers looked for the material, they were unable to produce it. G.S. 15A-902(a).

**3. Homicide § 28— failure to instruct on deceased's reputation for violence—no prejudicial error**

The trial court's failure to apply evidence of deceased's reputation for violence to the question of defendant's reasonable apprehension of death or great bodily harm was not prejudicial error where the jury was fully charged on the law of self-defense.

**4. Homicide §§ 27.2, 28.8— failure to instruct on accidental killing and involuntary manslaughter proper**

Where all the evidence, including that of defendant, indicated that she intentionally fired a weapon, the trial court properly failed to instruct on the defense of an accidental killing and involuntary manslaughter since there was no evidence of an accidental discharge of the pistol.

**5. Constitutional Law § 48— effective assistance of counsel—refusal of request of counsel to testify**

Defendant was not denied effective assistance of counsel because her counsel did not insist that the court rule on her motion for mistrial so that counsel could testify to impeach two of the State's witnesses. Ethical Consideration EC5-10 of the Code of Professional Responsibility of The North Carolina State Bar, under some circumstances, allows counsel to testify

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**State v. Elam**

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without withdrawing. Further, counsel stipulated for the jury what she would have testified if called as a witness, and a tape recording of the disputed statements was played for the jury.

APPEAL by defendant from *Clark, Judge*. Judgment entered 16 February 1981. Heard in the Court of Appeals 2 March 1982.

Defendant appeals her conviction of murder in the second degree.

The state's evidence tended to show that on 12 July 1980, defendant's estranged husband, William Elam, and two friends passed defendant's house in Mr. Elam's car. Mr. Elam was driving. They saw a woman wearing a white uniform standing on the porch. They drove south past the house to an intersection where Mr. Elam made a U-turn and headed back north. Mr. Elam's friends then noticed a Ford LTD approaching them from the rear. The Ford pulled up on the left side of Mr. Elam's car, striking the left front and forcing it toward the ditch. The defendant jumped out of the Ford, asked "Why did you hit my car?" and before Mr. Elam could move or respond, the defendant shot him once in the face. Defendant left the scene. As a result of the gunshot wound, Elam died.

Defendant testified that on 12 July she arrived home at 10:30 p.m. and as she did so, she saw her husband and two other men drive by. She entered the house, changed into her uniform, and as she left for work, she noticed a car parked down the road. She proceeded north in her car. At that time Mr. Elam's car came speeding up behind her and forced her out of her lane. She pulled back into the right lane and her car collided with Mr. Elam's. When she stopped her car, Mr. Elam and a tall man got out of Elam's car and Mr. Elam said, "Get her! Get her!"

Defendant testified that the tall man had something in his hand and Mr. Elam held a gun; that she fired her .22-caliber pistol to scare them off; and that she did not mean to hit or hurt anyone when she fired. She further testified that there had been violent domestic quarrels between the two and that Mr. Elam had threatened her life on several occasions and had assaulted her.

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State v. Elam

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*Attorney General Edmisten, by Associate Attorney Walter M. Smith, for the State.*

*Assistant Appellate Defender Marc D. Towler for defendant.*

MARTIN (Harry C.), Judge.

[1] Defendant first contends the court erred in excluding the testimony of the witness Barbara Jenkins concerning the character and reputation of defendant in her "work setting." We find no error. First, the record does not reflect what the witness would have answered; therefore, we cannot determine if the exclusion was prejudicial. *State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978); *State v. Darden*, 48 N.C. App. 128, 268 S.E. 2d 225 (1980). Further, assuming the testimony would have been favorable to defendant, it was cumulative. Three other witnesses testified defendant had a good character and reputation. Two of the witnesses were Baptist ministers. Under these circumstances, we cannot hold the exclusion of the testimony, if erroneous, was prejudicial. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966); *State v. Lindsey*, 25 N.C. App. 343, 213 S.E. 2d 434, *cert. denied*, 287 N.C. 468 (1975).

[2] The trial judge refused to instruct the jury that it could infer from the state's failure to produce written statements made by the eyewitnesses Rhone and Thompson that the statements were damaging to the state's case. Defendant argues this was error, relying upon *People v. Zamora*, 28 Cal. 3d 88, 615 P. 2d 1361 (1980). In *Zamora*, the city attorney's office had directed the destruction of all records of citizen complaints against police officers if the complaints were considered unmeritorious. The court held that the trial judge should instruct the jury that the officers had used excessive force in the incidents complained of in the destroyed records. Such is not the case here. There is no intimation that the evidence was destroyed. Defendant did not make her motion to produce until immediately before trial, and although the officers looked for the material, they were unable to produce it. The statutory discovery process contemplates that it shall be done pretrial. N.C. Gen. Stat. § 15A-902(a) (1978). In most instances, pretrial discovery will eliminate the very problem here complained of. We find no abuse of discretion by the ruling of the trial court. See *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975).

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State v. Elam

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[3] We find no prejudicial error in the trial court's failure to apply evidence of deceased's reputation for violence to the question of defendant's reasonable apprehension of death or great bodily harm from the alleged assault by deceased. The jury was fully charged on the law of self-defense. On this state of facts, we find *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971), to be controlling. Although this was error, we do not find it, standing alone, sufficient to require a new trial. *Id.*

[4] Defendant argues the court should have charged on the defense of an accidental killing and involuntary manslaughter. All the evidence, including that of defendant, indicates that she intentionally fired the weapon. There was no evidence of an accidental discharge of the pistol. Defendant testified, "I had a pistol and fired to scare them off. . . . After I fired the gun . . ." She says she intentionally fired the gun. The assignments of error are meritless. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); *State v. Efird*, 37 N.C. App. 66, 245 S.E. 2d 226 (1978), *cert. denied*, 301 N.C. 98 (1980).

Defendant argues that the solicitor in four instances committed prejudicial error in his jury argument. We have carefully examined the entire argument of counsel and cannot find it to contain prejudicial error so as to require a new trial. The trial judge has broad discretion in controlling the argument of counsel, especially in hotly contested cases. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). We find no abuse of that discretion.

[5] Last, defendant insists that she was denied effective assistance of counsel because her counsel did not insist that the court rule on her motion for mistrial so that counsel could testify to impeach state's witness Daws, to the effect that Daws was present during the entire interview of state's witnesses Rhone and Thompson. Ethical Consideration EC5-10 of the Code of Professional Responsibility of The North Carolina State Bar, volume 4A of the General Statutes of North Carolina (Cum. Supp. 1981), states: "In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness." A mistrial was not necessary in order for defendant's counsel to testify in the case. Whether she could withdraw as counsel was a

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**Moore v. Piedmont Processing Company**

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matter in the sound discretion of the trial judge. *State v. Brady*, 16 N.C. App. 555, 192 S.E. 2d 640 (1972), *cert. denied*, 282 N.C. 582 (1973). See *Smith v. Bryant*, 264 N.C. 208, 141 S.E. 2d 303 (1965); 81 Am. Jur. 2d *Witnesses* §§ 98, 98.5 (1976). A motion to allow defense counsel to testify in this case on a collateral matter, impeachment of a witness, would have been in the discretion of the trial judge. *People v. Stratton*, 64 Mich. App. 349, 235 N.W. 2d 778 (1975).

Moreover, here counsel stipulated for the jury what she would have testified if called as a witness. Further, a tape recording of the disputed statements was played for the jury. We find no violation of defendant's right to effective counsel.

No error.

Judges MARTIN (Robert M.) and WHICHARD concur.

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NADINE BEACH MOORE, AS ADMINISTRATRIX OF THE ESTATE OF GWYN BEACH,  
PLAINTIFF/APPELLANT v. PIEDMONT PROCESSING COMPANY AND  
LUMBERMEN'S MUTUAL INSURANCE COMPANY, DEFENDANTS/AP-  
PELLEES

No. 8110IC572

(Filed 6 April 1982)

**Master and Servant § 68— workers' compensation—occupational disease—denial of compensation proper**

The Industrial Commission's findings that decedent was not disabled as a result of an occupational disease were supported by the evidence and the findings supported the conclusion and award denying benefits. Further, the Commission was not bound to find from the evidence that plaintiff's bronchitis was caused by exposure to cotton dust and, even if bronchitis were an occupational disease, plaintiff had not proven that bronchitis due to cotton dust exposure caused decedent any calculable degree of disability.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award entered 19 February 1981. Heard in the Court of Appeals 3 February 1982.

Plaintiff sought Workers' Compensation benefits for the pulmonary disability of her decedent allegedly caused by ex-

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posure to cotton dust. Commissioner Shuford entered an opinion and award denying the claim, and the full Industrial Commission affirmed. Plaintiff appealed.

*Gillespie & Lesesne, by Louis L. Lesesne, Jr., for plaintiff appellant.*

*Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr., for defendant appellees.*

WHICHARD, Judge.

The Industrial Commission concluded that plaintiff's decedent "did not suffer from disability as a result of an occupational disease within the meaning of the Workers' Compensation Act." We find that the findings of fact, which are supported by competent evidence, adequately support this conclusion; and we therefore affirm the denial of benefits.

The chief medical witness testified as follows: Decedent worked 48 years in cotton mills, smoked about one pack of cigarettes a day for forty years, and was totally disabled when he applied for benefits. The primary causes of decedent's disability were bronchitis and emphysema. (In his 1979 examination report the witness had listed his "first two impressions" as "1. pulmonary emphysema" and "2. chronic bronchitis.") Bronchitis is more commonly found among cotton mill workers than among members of the general public, but is not "peculiar to" cotton mill workers. It is impossible to distinguish the relative contributions of bronchitis and emphysema to decedent's disability. Exposure to cotton dust "probably" contributed to his disability, but cannot be said to have "caused" it. Smoking played a "large role" in his disability and "could or might" have caused either the bronchitis or the emphysema or both. The relative contributions of cotton dust and smoking to the bronchitis cannot be distinguished. Decedent had no classic history of "Monday morning" symptoms.

To obtain benefits plaintiff must show that (1) decedent suffered from an "occupational disease," that is, one "due to causes and conditions which are characteristic of and peculiar to a particular . . . occupation . . . , but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment," G.S. 97-53(13); and (2) this occupational disease

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**Moore v. Piedmont Processing Company**

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resulted in disability to work. *Morrison v. Burlington Industries*, 304 N.C. 1, 12, 282 S.E. 2d 458, 466-67 (1981).

Plaintiff assigns error to the following findings and conclusion of the commission:

FINDINGS OF FACT

. . . . .

6. . . . [The doctor's] primary diagnosis or impression was pulmonary emphysema . . . .

7. . . . There were no symptoms referable to the work environment . . . .

8. Deceased was not disabled as a result of an occupational disease within the meaning of the Workers' Compensation Act . . . .

9. The primary cause of deceased becoming disabled was the disease emphysema, which is not characteristic of or peculiar to the textile industry. The primary cause of deceased's emphysema was the almost "40 pack years" of cigarette smoking.

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. . . . .

CONCLUSIONS OF LAW

1. Deceased . . . did not suffer from disability as a result of an occupational disease within the meaning of the Workers' Compensation Act.

The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence in the record. *Walston v. Burlington Industries*, --- N.C. ---, ---, 285 S.E. 2d 822, 827 (1982) (as corrected by N.C. Supreme Court order No. 116A81, filed 8 March 1982); *Morrison v. Burlington, Inc.*, 304 N.C. 1, 6, 282 S.E. 2d 458, 463 (1981). The conclusions of the commission will not be disturbed if justified by the findings of fact. *Inscocoe v. Industries, Inc.*, 292 N.C. 210, 216, 232 S.E. 2d 449, 452 (1977); *Rutledge v. Tultex Corp.*, --- N.C. App. ---, --- S.E. 2d --- (filed 16 March 1982).



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We hold that the Commission's findings are adequately supported by the medical testimony, and that the findings support the conclusion and award denying benefits.

The Commission made no findings regarding bronchitis. Plaintiff argues that under *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981), "this case [must] be remanded to the Industrial Commission for further findings as to the role of other diseases in causing decedent's disability, particularly with respect to the disease of chronic bronchitis." A remand was necessitated in *Hansel* because our Supreme Court was "unable to say that the findings justify the Commission's conclusion as to causation and its award" since "the medical evidence in the record [was] not sufficiently definite . . . to permit effective appellate review." *Hansel*, 304 N.C. at 50-51, 283 S.E. 2d at 105. The chief medical witness' testimony here was "sufficiently definite" to support the Commission's conclusion that decedent "did not suffer from disability as a result of an occupational disease." (Emphasis added.)

Although there was evidence to support a finding that cotton mill workers were subject to "increased risk" of contracting bronchitis, see *Booker v. Medical Center*, 297 N.C. 458, 472, 256 S.E. 2d 189, 198 (1979), there was no compelling evidence that any higher incidence of bronchitis among cotton mill workers was "due to . . . conditions . . . characteristic of and peculiar to" that occupation, G.S. 97-53(13) (emphasis added). The chief medical witness testified only that bronchitis "could or might be caused in some instances by conditions characteristic of work in the cotton textile industries." The Commission was not bound to find from this evidence alone that bronchitis was an occupational disease.

Further, the Commission was not bound to find from the evidence that plaintiff's bronchitis was caused by exposure to cotton dust. The chief medical witness testified that he was "unable to state with any degree of medical certainty the degree that either cigarette smoking or cotton dust exposure could or might have played in [decedent's] bronchitis." Thus, even if bronchitis were an occupational disease, plaintiff could properly be denied benefits because she had not proven that bronchitis *due to cotton dust exposure* caused decedent any calculable degree of disability.

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**Moore v. Piedmont Processing Company**

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When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

*Morrison, supra*, 304 N.C. at 18, 282 S.E. 2d at 470. Plaintiff had "the burden of proof 'to show not only . . . disability, but also its degree.'" *Id.*, 304 N.C. at 13, 282 S.E. 2d at 467.

We note that this is not a situation where "a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated . . . by an occupational disease so that . . . the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent." *Id.*, 304 N.C. at 18, 282 S.E. 2d at 470. There is no evidence that decedent entered into cotton mill employment with a distinct condition that could have been aggravated by cotton dust exposure.

Because plaintiff failed to carry her burden of proving that decedent's disability resulted from a disease caused by conditions characteristic of his occupation, we affirm the findings, conclusions and award of the Industrial Commission denying benefits. See *Walston v. Burlington Industries, supra*; *Rutledge v. Tultex Corporation, supra*.

Affirmed.

Judges CLARK and ARNOLD concur.

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Whitener v. Whitener

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WARREN B. WHITENER v. OLLIE VEE WHITENER

No. 8129DC381

(Filed 6 April 1982)

**1. Process § 9— action for an accounting—no in rem or quasi in rem jurisdiction**

In an action in which plaintiff asked for an accounting from the defendant for money which she received in Florida, the action was neither *in rem* nor *quasi in rem* since the action did not affect the debt which was owed by the persons in North Carolina to the parties to the suit nor did the plaintiff garnish the debt in this State as an ancillary proceeding to the action.

**2. Process § 9— interest in note secured by deed of trust—no minimum contact—no in personam jurisdiction**

The district court properly dismissed an action by plaintiff for an accounting by defendant of monies she had received in Florida as payments on a purchase money note secured by a deed of trust on property in North Carolina due to lack of *in personam* jurisdiction. Defendant sold the property in North Carolina in 1968; she has not been in North Carolina since that time; and G.S. 1-75.4(6)(b) does not give the North Carolina court jurisdiction for a suit against the defendant for an accounting of money she received on the note.

APPEAL by plaintiff from *Greenlee, Judge*. Judgment entered 17 February 1981 in District Court, HENDERSON County. Heard in the Court of Appeals 19 November 1981.

The plaintiff has appealed from an order dismissing this action on the ground the court did not have *in personam* jurisdiction over the defendant. The pleadings establish that the parties to this action were married in 1926 and divorced in 1973. The parties were residing in Florida in 1968 at which time they sold a parcel of real estate in Henderson County and took for it a purchase money note secured by a deed of trust. The defendant has been domiciled in Florida since the property in Henderson County was sold. The plaintiff, who is now domiciled in North Carolina, brought this action for an accounting by the defendant of monies she has received in Florida as payments on the purchase money note. In his complaint the plaintiff alleged that on 2 August 1977 an action identical in substance to the instant case was filed in which an order had been issued to the payors of the note to deliver all payments to the Clerk of Superior Court of Henderson County. A voluntary dismissal has been taken in that action. In his prayer for relief the plaintiff asked for an accounting, a money judgment for any sum due, and that the Clerk of Superior Court

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of Henderson County be ordered to continue holding the money paid to him pursuant to the order in the previous action.

The defendant was served process by mailing a copy of the complaint to her by certified mail.

*Lee Atkins for plaintiff appellant.*

*Prince, Youngblood, Massagee and Creekman, by James E. Creekman, for defendant appellee.*

WEBB, Judge.

[1] The plaintiff first contends that the district court has jurisdiction because this is an *in rem* or *quasi in rem* action. Plaintiff argues this is so because there is a debt owed by persons in North Carolina to the parties to this suit. We do not believe this is an action *in rem* or *quasi in rem*. An *in rem* action deals with a proceeding regarding a thing. An action is *quasi in rem* if a thing which is not the subject of an action is attached or garnished in an ancillary proceeding in order to make it subject to the judgment against the defendant. See *Holt v. Holt*, 41 N.C. App. 344, 255 S.E. 2d 407 (1979); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E. 2d 164 (1978); *Allen and O'Hara, Inc. v. Weingart*, 23 N.C. App. 676, 209 S.E. 2d 839 (1974). In this case the plaintiff has asked for an accounting from the defendant for money which she received in Florida. This does not affect the debt which is owed by the persons in North Carolina to the parties to this suit. This is not an *in rem* action. The plaintiff has not garnished the debt in this state as an ancillary proceeding to this action. This is not a *quasi in rem* action.

[2] The plaintiff also contends the court has *in personam* jurisdiction of the defendant. The parties agree that the defendant was in form properly served so that the court has jurisdiction if this is an action in which the defendant may be served with process outside the state. If the court has *in personam* jurisdiction, it is under G.S. 1-75.4 which provides:

"A Court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

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\* \* \*

(6) Local Property.—In any action which arises out of:

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- b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced . . . .”

The plaintiff contends this action involves a claim to recover for a benefit the defendant derived by the ownership of real estate in North Carolina, which was sold in 1968 and now is the security for the payment of a note, and this brings defendant within the purview of G.S. 1-75.4(6)(b).

In interpreting G.S. 1-75.4(6)(b) as applied to the facts of this case we have to be mindful of the due process requirements of the Fourteenth Amendment to the United States Constitution. The due process clause requires that in order for a court to have personal jurisdiction over a person not domiciled in the state and not served with process in the state that the person must have certain minimum contacts with the state. *See Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977) and *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945). In *Shaffer*, the United States Supreme Court held that the fact that a person held stock in a Delaware corporation was not a sufficient contact to give the Delaware courts jurisdiction over that person. The subject matter of the action did not involve the defendant's rights as a stockholder although it did involve his action as an officer of the corporation. In *Balcon v. Sadler*, *supra*, this Court held there was not a sufficient minimum contact to support jurisdiction over a Maryland resident who owned real estate in this state when the plaintiff, also a Maryland resident, brought an action in this state on a claim that arose in Maryland and was unrelated to the North Carolina real estate. In *Holt v. Holt*, *supra*, this Court held that the district court had jurisdiction over a resident of another state who owned real estate in North Carolina. In that case the plaintiff sued on a Missouri alimony judgment. The court in that case held

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there were several factors which showed there was a relationship between the defendant's North Carolina property and the controversy between the parties. The defendant bought the property shortly after the entry of the Missouri decree which led the court to conclude that he was spending part of his income on the North Carolina property rather than making his alimony payments in Missouri. The parties in a separation agreement had divided property they owned in North Carolina. This Court held that these factors showed that the North Carolina property was a part of the source of the underlying controversy between the plaintiff and the defendant and the court had jurisdiction in a *quasi in rem* action.

In the instant case the record discloses that the defendant sold property in North Carolina in 1968. So far as we can tell from the record she has not been in North Carolina since that time. She does own an interest in a note secured by a deed of trust on property in this state. There is no dispute between the parties as to whether the note should be paid. The only dispute is what has the defendant done with the payments. In *Shaffer v. Heitner, supra*, the fact that the defendants relied on Delaware law to protect their interests as stockholders did not give the Delaware court jurisdiction of the defendants in an action unrelated to their rights as stockholders. We believe that if we read G.S. 1-75.4(6)(b) to give the North Carolina court jurisdiction for a suit against the defendant for an accounting of money she received on the note it would violate the rule of *Shaffer*. This case is distinguishable from *Holt* in that in *Holt* the defendant had invested his money in property in this state rather than pay alimony as ordered by a Missouri decree. The defendant in the instant case had sold her property five years prior to the Florida divorce decree. There is no indication the sale was connected with the Florida action.

In light of the serious constitutional problems that would arise were we to hold otherwise, we hold that G.S. 1-75.4(6)(b) does not give the District Court of Henderson County *in personam* jurisdiction in this case. The action was properly dismissed.

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**Gower v. Strout Realty, Inc.**

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Affirmed.

Judges VAUGHN and HILL concur.

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MICHAEL W. GOWER, AND EDWARD E. HUGHES, T/A GOWER-HUGHES INVESTMENT PROPERTIES, A PARTNERSHIP v. STROUT REALTY, INC.

No. 818SC596

(Filed 6 April 1982)

**1. Brokers and Factors § 8— brokers not licensed in North Carolina—co-brokerage agreement unenforceable**

A co-brokerage or commission sharing agreement between plaintiffs, licensed real estate brokers and agents in California, and defendant was in violation of the Real Estate License Law, G.S. 93A-1, and invalid and unenforceable because plaintiffs were not licensed in this State.

**2. Brokers and Factors § 6— contract to buy real estate and share in commission—no violation of licensing statute**

Where plaintiffs alleged a contract to buy real estate on their own account under the terms of a listing agreement made by the owner with defendant-broker and to share in the sales commission with defendant, plaintiffs were not engaging in brokerage activities "for others" but were acting for themselves in buying the land and reducing the purchase price through the commission sharing agreement with defendant, and the agreement did not violate the licensing statute and is enforceable. G.S. 93A-2.

APPEAL by plaintiffs from *Tillery, Judge*. Judgment entered 11 May 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 5 February 1982.

Plaintiff Gower, a licensed real estate broker in the State of California, and plaintiff Hughes, a licensed real estate agent in the State of California, seek to recover of the defendant under a co-brokerage agreement an amount equal to one-half of a real estate commission in the sum of \$19,725.00, alleging that they found a ready, able and willing buyer for the Carriage House Apartments in Lenoir County which was listed for sale by the owner with defendant for \$789,000.00 with a 5% commission as provided in the written listing contract.

In their second claim for relief plaintiffs allege that the ready, able, and willing buyer was the plaintiff Hughes; and that

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**Gower v. Strout Realty, Inc.**

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plaintiffs and defendant, through its agent Irvin Staton, agreed to share the commission even if the plaintiff Hughes was the purchaser of the property; and that said plaintiff became a ready, able and willing buyer and tendered the purchase price in cash on 6 April 1979, but that the owner had cancelled the listing agreement.

Plaintiffs also allege false representation by defendant that it had a listing agreement with the owner and fraud by Irvin A. Staton, agent for defendant; and they pray for both punitive damages and for treble damages under G.S. 75-1.1 for deceptive trade practices.

Defendant in its answer denied the co-brokerage agreement, denied that plaintiffs produced a ready, able and willing buyer, and pleaded as a defense that plaintiffs were not licensed real estate brokers in this State and could not recover a realty commission in North Carolina.

Defendant moved for summary judgment. The only supporting matter offered in support of the motion by the defendant was the affidavit that plaintiffs were not licensed real estate brokers or salesmen in North Carolina. The trial court allowed summary judgment for the defendant.

*White, Allen, Hooten, Hodges & Hines by John M. Martin for plaintiff appellants.*

*Jeffress, Morris, Rochelle & Duke by Thomas H. Morris and Vernon H. Rochelle for defendant appellee.*

CLARK, Judge.

The question on appeal is whether the trial court erred in allowing summary judgment for the defendant, which offered in support of its motion only the affidavit that plaintiffs were not licensed real estate brokers or salesmen in North Carolina. It thus appears that defendant and the trial court relied on the principle of law that the co-brokerage or commission sharing agreement between plaintiffs and defendant as alleged was in violation of the Real Estate License Law, Chapter 93A of the General Statutes, and invalid and unenforceable because plaintiffs, though allegedly licensed in California, were not licensed in this State. G.S. 93A-1 forbids an unlicensed agent to be engaged in the



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business of real estate broker or salesman, and our courts have held that a contract to engage in such business by an unlicensed person in this State is invalid. *Raab & Co. v. Independence Corp.*, 9 N.C. App. 674, 177 S.E. 2d 337 (1970); *McArver v. Gerukos*, 265 N.C. 413, 144 S.E. 2d 277 (1965). This rule of law is also applied in other jurisdictions. See Annot., 118 A.L.R. 646 (1939); Annot., 42 A.L.R. 1226 (1926); Annot., 30 A.L.R. 834 (1924); and Annot., 4 A.L.R. 1087 (1919).

[1] In their first claim for relief plaintiffs allege an agreement with defendant to split the commission if they "procured a buyer who was ready, willing and able to meet the purchase price and terms set out . . . ." Does the procurement of a buyer constitute engaging in the business of real estate broker or salesman? In pertinent part G.S. 93A-2(a) defines a real estate broker as one who for compensation "lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction . . . or negotiates the purchase or sale or exchange of real estate, . . ." G.S. 93A-2(b) provides in general terms that a real estate salesman is one who, under the supervision of a broker, for a compensation "is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act . . ." defined in G.S. 93A-2(a).

The alleged agreement in the first cause of action is generally referred to as a "finder's fee" contract, an arrangement by which an intermediary finds, introduces, and brings together parties to a real estate transaction, leaving the ultimate transaction and consummation of the transaction to the broker. There is a split of authority on the question of whether a "finder's fee" contract is invalid because it violates licensing law. See Annot., 24 A.L.R. 3d 1160, 1172, *et seq.* We find the better view to be that, though the finder or originator does not assist in the ultimate negotiations of sale, the real estate licensing statutes would become meaningless if unlicensed parties were able to carry on traditional brokerage activities under a finder's fee contract. We find the agreement alleged in plaintiffs' first cause of action in violation of G.S. 93A-1 and invalid. Summary judgment for defendant on this first claim was properly entered.

[2] In their second claim plaintiffs allege that in addition to their co-brokerage agreement, the defendant further agreed that the

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commission would be due even if plaintiff Hughes were the purchaser of the property. G.S. 93A-2 defines "real estate broker" as a person who does the acts specified "for others." In *McArver v. Gerukos*, *supra*, the court stated:

"Thus, it is clear that the Legislature did not intend for this act to apply to a person, partnership or association who purchases land for his or its own account, even though such purchase is for resale. Therefore, a contract by one who is not a licensed real estate broker or salesman with another person to buy land, or an option thereon, for their own account and, thereafter, to resell such land, or option, and divide the profits would not be a contract to do an act prohibited by this statute." *Id.* at 418, 144 S.E. 2d at 281.

In *McArver* it was held that a contract between the unlicensed plaintiff and the defendant, a licensed real estate broker, providing for payment to plaintiff by defendant of a portion of the commissions, profits and payments received by defendant in connection with the sale of the options (which plaintiff assisted defendant-broker in obtaining) and the negotiation of the lease, was a valid and enforceable contract and not in violation of G.S. 93A-2. In the case *sub judice* the plaintiffs allege a contract to buy real estate on their own account under the terms of the listing agreement made by owner with defendant-broker and to share in the sales commission with defendant. Plaintiffs were not engaging in brokerage activities "for others" but were acting for themselves in buying the land and in reducing the purchase price through the commission sharing agreement with defendant. The agreement does not violate the licensing statute and is enforceable. The trial court erred in allowing summary judgment for defendant on the second claim for relief.

In the second claim for relief the plaintiffs also allege, in addition to breach of the commission sharing agreement, a fraudulent misrepresentation of the listing agreement, and they pray for punitive damages. In the third claim for relief plaintiffs allege a violation of the unfair and deceptive trade statute (G.S. 75-1.1) and seek treble damages pursuant to G.S. 75-16. Since the appeal is from the judgment allowing summary judgment for defendant and not from judgment on the pleadings under G.S. 1A-1, Rule 12(c), we find that whether plaintiffs failed to state a

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claim for fraud and for violation of G.S. 75-1.1 are not issues properly before the Court on this appeal. We do note that G.S. 1A-1, Rule 9(b), requires that the circumstances constituting fraud shall be stated with particularity.

The summary judgment for defendant on the plaintiffs' first claim for relief is affirmed, and the summary judgment on the second and third claims for relief is reversed.

Affirmed in part; reversed in part.

Judges ARNOLD and WHICHARD concur.

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STATE OF NORTH CAROLINA v. WILLIE JACKSON

No. 8116SC820

(Filed 6 April 1982)

**1. Criminal Law § 83— husband-wife privilege—admission of confidential communications—harmless error**

Even if an officer's testimony as to what defendant's wife told him about defendant's conduct on the day in question concerned confidential communications between husband and wife which tended to show flight, tended to bolster testimony by the prosecutrix that defendant was drinking, and showed that defendant did not deny guilt to his wife, the admission of such testimony was not prejudicial error where there was other evidence of flight and drinking and defendant's statements to his wife contained no admission of guilt.

**2. Criminal Law § 99.2— denial of unnamed motion—no expression of opinion**

The trial court did not express an opinion when the court asked defense counsel at the close of the evidence whether he wanted to make a motion, defense counsel stated, "Yes, sir, I would," and the court responded, "Motion denied," since it appears that both defense counsel and the trial court understood the motion to which each was referring and that no error resulted.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 19 March 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 January 1982.

Defendant was indicted for larceny of a firearm. He pleaded not guilty.

State presented Grace Turner as a witness. She testified that the defendant came to her home on the morning of 26 October

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1980 to borrow a wrench. Defendant sat in a chair next to a television while Turner went into another room to get the wrench. Upon returning, Turner noticed that the .38 pistol that she kept on the television was gone. She accused defendant, but he denied taking the pistol. Defendant gave Turner his name and address and telephone number. Defendant had a liquor bottle stuck under his belt in front, and he took a drink from the bottle and got a drink of water from Turner before leaving. Turner then called the police. Officer Elbert Ivey responded to the call. He saw defendant about half a block away from Turner's house. Defendant took something from his pocket and put it under a car. Officer Ivey stopped and retrieved a liquor bottle from underneath the car. He called defendant over and saw "the impression of some type of handgun" sticking in defendant's belt under his shirt. He said that he wanted to talk to defendant about a gun, and defendant ran away. The officer went on to defendant's house and talked with defendant's wife. The officer testified

she said he hadn't been home since early that morning, and when he left, he was drinking pretty heavy, and he had some whiskey with him. I went back later for him in the afternoon and talked with Miss Jackson, and she stated that Willie came home, got some canned goods in a bag, and a blanket and said he was going to the woods; said the law was looking for him.

The officer arrested defendant two days later but did not recover Turner's pistol.

Defendant was convicted and sentenced to imprisonment. Defendant appeals.

*Attorney General Edmisten, by Associate Attorney John R. Corne, for the State.*

*Appellate Defender Adam Stein, by Assistant Appellate Defenders Malcolm R. Hunter, Jr., and Lorinzo L. Joyner, for defendant appellant.*

MARTIN (Robert M.), Judge.

[1] Defendant's first argument on appeal involves the testimony of Officer Ivey, quoted above, as to what defendant's wife told him about defendant's conduct on the day in question. Defendant

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argues that the wife's declarations concern confidential communications between husband and wife and that the trial judge should have excluded this testimony on his own motion. Defendant cites *State v. Dillahun*, 244 N.C. 524, 94 S.E. 2d 479 (1956), and *State v. Warren*, 236 N.C. 358, 72 S.E. 2d 763 (1952). Accepting defendant's contentions *arguendo*, we nonetheless find the error harmless in this case. In awarding a new trial in *Warren*, our Supreme Court noted that the inference contained in the statement attributed to the defendant's wife in that case was "unmistakably incriminating and harmful." *Id.* at 360, 72 S.E. 2d at 764. We cannot say the same here. Defendant argues that his wife's declarations were prejudicial since they provided evidence of flight, since they showed that he had been drinking and thereby bolstered Turner's testimony, and since they showed that he did not deny his guilt to his wife. However, there was other evidence of flight through the testimony of Officer Ivey. Officer Ivey's testimony also tended to show that the defendant was carrying a bottle of liquor on the day in question. Although the wife's declarations contained no denial of defendant's guilt, they contained no admission of guilt either. Defendant only told her that the law was looking for him. In short, we conclude that defendant has not carried the burden imposed by G.S. 15A-1443(a) of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

[2] In his second argument on appeal, the defendant contends that the trial judge expressed an opinion on the merits of the case through his denial of a defense motion at the close of evidence and through his unbalanced summary of the evidence. At the close of evidence we find the following exchange:

[DEFENSE COUNSEL]: . . . Defendant offers no evidence, your Honor.

THE COURT: You want to make a motion?

[DEFENSE COUNSEL]: Yes, sir, I would.

THE COURT: Motion denied.

Defendant cites *State v. Goode*, 300 N.C. 726, 268 S.E. 2d 82 (1980); however, that case is easily distinguishable from the present one. In *Goode* the trial judge in the presence of the jury

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denied unnamed motions before they were made and then immediately denied defense counsel's request for a short recess to decide whether defendant would offer evidence. In finding an abuse of discretion, our Supreme Court relied almost exclusively on the denial of the defense motion for a recess. *Goode* does not stand for the proposition that the denial of unnamed motions alone constitutes an abuse of discretion or the expression of an opinion prejudicial to defendant. Although we do not approve the practice, we believe that in the present case both defense counsel and the trial judge understood the motion to which each was referring and that no error resulted. Defendant also argues that the trial judge's summary of the evidence in his charge was unbalanced in favor of the State. G.S. 15A-1232 requires the trial judge to summarize the evidence only to the extent necessary to explain the application of the law thereto. Where, as in the present case, defendant presents no evidence, the judge must nonetheless summarize evidence favorable to defendant which is brought out on cross-examination if necessary to explain the application of the law. However, this requirement does not apply when the evidence on cross-examination is of only an impeaching effect and does not go to the establishment of a substantive defense. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980). We find no error in the summary of the evidence herein.

No error.

Judges WEBB and WELLS concur.

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GAIL H. WILLIFORD AND TINA GAIL WILLIFORD v. DAVID E. WILLIFORD

No. 8116DC674

(Filed 6 April 1982)

**1. Divorce and Alimony §§ 21, 24.4— failure to make alimony and child support payments— order finding contempt proper**

The trial court did not err in entering an order adjudging defendant in wilful contempt for failure to make alimony and child support payments where defendant voluntarily left the employment he had when a separation agreement was entered, defendant remarried and had a child by the second marriage, he applied his income to matters other than his obligations under the

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Williford v. Williford

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agreement and court orders, and where defendant failed to comply with an order to specifically perform the provisions of the separation agreement.

**2. Divorce and Alimony § 19.5— specific performance of separation agreement does not subject it to modification**

The exercise of the equitable remedy of specific performance does not alter the contractual nature of a separation agreement and does not render it a court order subject to modification; therefore, where the court ordered specific performance of the provisions of a separation agreement concerning alimony and support payments, the court did not err in refusing to admit evidence of defendant's changed circumstances and to modify the alimony provision.

APPEAL by defendant from *Ellis, Judge*. Order entered 30 January 1981 in District Court, SCOTLAND County. Heard in the Court of Appeals 4 March 1982.

Defendant appeals from an order adjudging him in wilful contempt for failure to make alimony and child support payments.

*Terry R. Garner and David F. Tamer for plaintiff appellees.*

*John C. B. Regan, III, for defendant appellant.*

WHICHARD, Judge.

The complaint alleged and the answer admitted that defendant and plaintiff Gail H. Williford had entered a Separation Agreement providing for payment by defendant of alimony and child support. On the basis of defendant's admission, summary judgment was allowed and defendant was ordered specifically to perform the provisions of the agreement.

Thereafter the court adjudged defendant in contempt for non-compliance. It prescribed a method whereby he could purge the contempt. Defendant again failed to comply, however, and a further contempt order was entered.

Defendant appeals from this order, assigning as error (1) entry of the order, and (2) refusal to admit his evidence of changed circumstances and to modify the alimony provisions. We affirm.

[1] Defendant contends he lacked the means to make the payments, and that his failure to comply thus was not wilful. He attributes his inability to make the payments to (1) reduction in income, and (2) acquisition of a second family.

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The court found the following facts:

Defendant voluntarily left the employment he had when the agreement was entered. He obtained new employment at a reduction in gross annual salary of approximately \$7,000.00. He then voluntarily left that employer to work for an unnamed concern for undisclosed compensation. His income situation was thus "of his own making."

Defendant remarried and had a child by the second marriage. He applied his income to matters other than his obligations under the agreement and court orders. Since entry of the orders he had continued to pay his country club dues, truck payments, and bank loan payments. Despite no ownership interest therein, he had commenced making the payments on a home owned by his second wife.

These findings are supported by competent evidence. They are thus conclusive on appeal and are reviewable only as to their sufficiency to warrant the order. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978); *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 154 S.E. 2d 313 (1967); *State Board of Registration v. Testing Laboratories, Inc.*, 52 N.C. App. 344, 278 S.E. 2d 564 (1981); *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981).

"[O]ne does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered." *Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E. 2d 403, 404 (1948). See also *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966); *Vaughan v. Vaughan*, 213 N.C. 189, 195 S.E. 351 (1938); *Jones v. Jones*, *supra*; *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980). However, "[a] defendant may not deliberately divest himself of his property and in effect pauperize himself for appearance at a hearing for contempt and thereby escape punishment because he is at that time unable to comply with the court order." *Bennett v. Bennett*, 21 N.C. App. 390, 393, 204 S.E. 2d 554, 556 (1974). Further, "[p]ayment of alimony may not be avoided merely because . . . the husband has remarried and voluntarily assumed additional obligations." *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E. 2d 218, 222 (1966). This principle also prevails with regard to child support. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967); *Hemby v. Hemby*, 29 N.C. App. 596, 225 S.E. 2d 143, *disc. rev. denied*, 290 N.C. 661, 228 S.E.



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2d 452 (1976). See also *Beasley v. Beasley*, 37 N.C. App. 255, 245 S.E. 2d 820 (1978), *aff'd*, 296 N.C. 580, 251 S.E. 2d 433 (1979); 3 Lee, North Carolina Family Law, § 229, p. 132 (4th ed. 1981).

Pursuant to these principles the above findings, supported by competent evidence, sufficed to warrant the order. The assignment of error to its entry is therefore overruled.

[2] Defendant further contends the court erred in refusing to admit evidence of his changed circumstances and to modify the alimony provisions. He argues that by securing an order of specific performance, plaintiffs changed the agreement from "a mere contract . . . which could not be modified, to a court order . . . which can be modified . . . based upon changed conditions."

Defendant relies on cases involving separation agreements which had been incorporated into court decrees and compliance therewith ordered. See *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); *Britt v. Britt*, 36 N.C. App. 705, 245 S.E. 2d 381 (1978). In such cases the agreement becomes an adjudication by the court and thus subject to modification by court order. *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967); *Sayland v. Sayland*, *supra*. Except in such cases, however, "[t]he ordinary rules governing the interpretation of contracts apply to separation agreements and the courts are without power to modify them." *Church v. Hancock*, 261 N.C. 764, 765, 136 S.E. 2d 81, 82 (1964).

The Separation Agreement here had not been incorporated into a court decree with which the parties had been ordered to comply. Because the available remedy at law for enforcement of a separation agreement not incorporated into a judicial decree is inadequate, plaintiff was entitled to a decree of specific performance ordering defendant to comply with the agreement. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979). See also *Henderson v. Henderson*, --- N.C. App. ---, 286 S.E. 2d 657 (1982). Defendant cites no authority, however, and our research discloses none, holding that exercise of the equitable remedy of specific performance alters the contractual nature of a separation agreement, and renders it a court order subject to modification. The agreement would thus appear to remain a contract which the courts are without power to modify. *Church v. Hancock*, *supra*; see also *Henderson v. Henderson*, *supra*; *Haynes v. Haynes*, 45 N.C. App. 376, 263 S.E. 2d 783 (1980).

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**State v. McGee**

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Assuming the contrary, however, *arguendo* only, defendant is not availed thereby. The excluded evidence establishes that defendant's changed circumstances resulted largely from his voluntary changes of employment and his remarriage; and there was no evidence demonstrating good faith efforts by defendant to comply with the provisions of the Separation Agreement. Under these circumstances modification was not merited.

The order is

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. ARTHUR JASON MCGEE

No. 8118SC1032

(Filed 6 April 1982)

**Criminal Law § 29— capacity to stand trial—further hearing required**

Where on 16 March 1981 a competency hearing was held concerning defendant's ability to stand trial, and defendant was found not competent to assist in his defense; where on 13 April 1981, the competency hearing was reconvened and defendant was found to be competent to stand trial; and where on 1 May 1981, before defendant could be tried, another judge ordered defendant recommitted for observation and treatment, the trial judge erred in relying on his 13 April 1981 order concluding that defendant was competent to stand trial. The 1 May order finding defendant "may be incapable of proceeding in this case," established a presumption that defendant was not competent to proceed to trial under the standard established in G.S. 15A-1001(a). Prior to defendant's trial, therefore, the court had an obligation to inquire again into the defendant's mental capacity to proceed to trial.

APPEAL by defendant from *Rousseau, Judge*. Judgments entered 15 May 1981, in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 March 1982.

Defendant was indicted on two counts of first degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. On 16 March 1981, prior to defendant's May trial, defense counsel moved for a competency hearing, which was allowed. During the hearing, a forensic psychiatrist, Dr. Allen

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State v. McGee

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J. Sherrow, testified that defendant was suffering from schizophrenic disorder, paranoid type, which had not been adequately treated for the purpose of proceeding with the charges against him. A second psychiatrist, Dr. Billy J. Royal, testified that he had examined defendant in December 1980, when defendant was committed by court order to Dorothea Dix Hospital. Dr. Royal stated that, in his opinion, the defendant was competent to stand trial. That opinion, however, changed after Dr. Royal was allowed to examine defendant in private during the competency hearing. After the examination, he concluded that defendant was not competent to assist in his defense and was, therefore, not competent to stand trial. Dr. Royal recommended further examinations.

As a result of this hearing, the trial court, without determining defendant's capacity to proceed with trial, ordered defendant committed again to Dix Hospital for re-evaluation and treatment. On 13 April 1981, the competency hearing was reconvened. Dr. Royal testified that, with proper medication (twenty milligrams of Navane per day), defendant could handle his chronic illness and that, in his opinion, at that time defendant had the capacity to comprehend his position, to understand the object and nature of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with counsel. Based on Dr. Royal's testimony as well as that of a Guilford County Deputy Sheriff who had observed defendant during his incarceration, Judge Rousseau concluded that defendant was competent to stand trial.

On 1 May 1981, before defendant could be tried, however, Superior Court Judge Albright ordered defendant recommitted to Dix Hospital for observation and treatment. In his order, Judge Albright found that defendant "may be incapable of proceeding in this case, and in need of treatment." On 11 May, with a letter from Dr. Royal, defendant was returned to the Guilford County Jail. The letter stated simply that the Dix Hospital staff had completed their evaluation and observation. When his case was called for trial, defendant, through counsel, again raised the issue of defendant's competence to stand trial. When defense counsel could offer no evidence to support his contention of incapacity to proceed, Judge Rousseau relied on his 13 April 1981 order concluding that defendant was competent to stand trial.

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The case immediately proceeded to trial, and the jury found defendant guilty of two counts of second degree murder and one count of assault with a deadly weapon inflicting serious injury. From judgment imposing active prison terms, defendant appealed.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General J. Chris Prather, for the State.*

*McNairy, Clifford & Clendenin, by Locke T. Clifford and Michael R. Nash, for defendant-appellant.*

WELLS, Judge.

The sole question we consider is whether the trial court erred in concluding that defendant was capable of pleading and standing trial at the time of his arraignment and trial. Because we find that Judge Albright's order recommitting defendant to Dorothea Dix Hospital for further observation established a presumption of a lack of capacity, we hold that a further hearing on the issue of his capacity to proceed to trial should have been held.

Under G.S. 15A-1001(a), "[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." Ordinarily, it is within the trial court's discretion to determine whether circumstances brought to its attention require a formal inquiry as to whether a defendant has sufficient mental capacity to plead to the indictment and to conduct a rational defense. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968).

In the present case, the evidence elicited in the competency hearings of 16 March and 13 April 1981 indicated that defendant's mental capacity was tenuous at best. In recommitting defendant to Dix Hospital on 1 May 1981, Judge Albright found that he "may be incapable of proceeding in this case." Judge Albright's order established a presumption that defendant was not competent to proceed to trial under the standard established in G.S. 15A-1001(a). Prior to defendant's trial, therefore, the court had an

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obligation to inquire again into the defendant's mental capacity to proceed to trial. *State v. Reid*, 38 N.C. App. 547, 248 S.E. 2d 390 (1978); *disc. rev. denied*, 296 N.C. 588, 254 S.E. 2d 31 (1979). This is so even though defense counsel stated that he had no evidence concerning defendant's capacity to proceed. *Cf. State v. Propst*, supra (where defendant's counsel stated that "he had nothing that had transpired" since defendant's last clinical report but the Supreme Court found necessary a further competency hearing).

The failure of the trial court to appropriately rehear and redetermine the question of whether the defendant was mentally competent to proceed to trial invalidated the subsequent trial. *State v. Reid*, supra. The verdict and the judgment must be vacated, and the cause is remanded to Superior Court for further proceedings consistent with this opinion.

Since defendant's other assignments of error are unlikely to occur at a new trial, we need not discuss them here.

Vacated and remanded.

Judges HILL and BECTON concur.

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GENE B. BRIDGERS, JUNE B. WARREN, ET VIR, G. WINSTON WARREN,  
ANNE B. HOWELL, ET VIR, C. WAYNE HOWELL, WALTER M. BRIDGERS  
AND BEATRICE M. BRIDGERS v. DEWEY W. BRIDGERS ET UX, FRANCES  
L. BRIDGERS

No. 816SC719

(Filed 6 April 1982)

**1. Partition § 1.2— persons entitled to petition for sale of timber**

G.S. 46-25, which changed the common law by permitting a life tenant to petition for a sale of timber for profit, is not limited in application to only those tracts of land in which interests are subject to a life estate.

**2. Partition § 1.2— cotenants need not have same interest to partition**

G.S. 46-25 does not require all cotenants to have the same type interest in the land in order to petition for a sale of standing timber from land.

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**Bridgers v. Bridgers**

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**3. Partition § 2— authority to sell timber—no requirement that partition not possible**

Remainderman in a one-half interest in two tracts of land could seek a sale of the timber on the two tracts of land even if an equitable division of the property was possible.

APPEAL by plaintiffs from *Fountain, Judge*. Judgment entered 3 March 1981 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 10 March 1982.

The present action involves two non-adjoining tracts of land in Northampton County. Tract 1 contains approximately 161 acres, of which approximately 100 acres are woodland. Tract 2 contains 27.3 acres, of which 15.86 acres are woodland.

Plaintiffs, Gene B. Bridgers, June B. Warren, Anne B. Howell, and Walter M. Bridgers, are cotenants in remainder of a one-half (1/2) undivided interest in Tracts 1 and 2. Their remainder interest is subject to a life estate in plaintiff, Beatrice M. Bridgers. Defendant, Dewey W. Bridgers, owns the other one-half (1/2) undivided interest in possession of Tracts 1 and 2. Beatrice Bridgers does not own a life interest in the one-half (1/2) undivided interest of Dewey Bridgers.

On 3 May 1979, plaintiffs petitioned the Clerk of Superior Court of Northampton County for a sale of the standing timber upon the two tracts of land, pursuant to G.S. 46-25. Defendant counterclaimed, seeking an actual partition of the tracts of land into two shares of equal value. He desired one share to be allotted to himself and one share to be allotted to the petitioners.

After considering the evidence of the parties, the clerk made the following pertinent findings:

. . .

- "17. The timber can be harvested without damage to the crop land or the other real estate.
18. The timber is not equally spread throughout each tract. While the land can be divided equally without the timber on it, and the growing timber could be divided equally without regard to the real estate, the growing timber and the real estate together can not [sic] be divided equally."

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**Bridgers v. Bridgers**

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The clerk concluded that cutting the timber was in keeping with good husbandry and that no substantial injury would be done to the remainder interest. He concluded that petitioners were entitled to the relief they had demanded.

Defendants appealed to the Superior Court. After hearing evidence, the judge found that the real estate was capable of division into two shares of substantially equal value, and that partition would not injure any of the parties. He concluded that G.S. 46-25 did not authorize the sale of the interest of Dewey Bridgers in the real estate since Mr. Bridgers' one-half (1/2) interest was not subject to an outstanding life estate. The judge ordered that the clerk's judgment be set aside. He remanded the cause to the clerk for an order appointing Commissioners to make an actual partition of the real estate of Tracts 1 and 2.

*Revelle, Burleson, Lee and Revelle, by L. Frank Burleson, Jr., for plaintiff appellants.*

*Allsbrook, Benton, Knott, Cranford and Whitaker, by J. E. Knott, Jr., for defendant appellees.*

VAUGHN, Judge.

At issue is the construction of G.S. 46-25 and its applicability to the present cause. G.S. 46-25 states the following:

"When two or more persons own, as tenants in common, . . . a tract of land, either in possession, or in remainder or reversion, subject to a life estate, or where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales. . . . Provided further, that prior to a judgment allowing a life tenant to sell the timber there must

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**Bridgers v. Bridgers**

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be a finding that the cutting is in keeping with good husbandry and that no substantial injury will be done to the remainder interest."

The Superior Court judge was of the opinion that G.S. 46-25 does not authorize a sale of standing timber in the present situation. There appears to be two reasons for that opinion. First, he concludes that the statute only authorizes the sale of timber from land in which the interest of all parties is subject to a life estate. In the present cause, the one-half undivided interest of Dewey Bridgers is not subject to an outstanding life estate. Second, he seems to conclude that where an actual division of the real estate is possible, a sale of standing timber cannot be had. We conclude that the judge erred in his construction of G.S. 46-25.

[1] G.S. 46-25 changes the common law by permitting a life tenant to petition for a sale of timber for profit. *Piland v. Piland*, 24 N.C. App. 653, 211 S.E. 2d 844, *cert. denied*, 286 N.C. 723, 213 S.E. 2d 723 (1975). The statute is not limited in application, however, to only those tracts of land in which interests are subject to a life estate. When the statute speaks of tenants in common "either in possession, or in remainder or reversion, subject to a life estate," the phrase "subject to a life estate" modifies only the words "remainder" and "reversion." Tenants in common who presently possess a tract of land may also petition for a sale of timber. See *Chandler v. Cameron*, 229 N.C. 62, 47 S.E. 2d 528 (1948).

[2] We further conclude that the statute does not require all cotenants to have the same type interest in the land. A cotenant in remainder may petition for a sale of standing timber from land in which the other cotenant has a present possessory interest. Such an interpretation is consistent with G.S. 46-3, which authorizes the partition of real estate upon a cotenant's petition without regard to the possessory interests of his cotenants.

We, therefore, hold that cotenants, Gene Bridgers, June Warren, Anne Howell, and Walter Bridgers, properly petitioned under G.S. 46-25 for a sale of the land's standing timber. Their interest is subject to a life estate in Beatrice Bridgers. Entitled to be made a party to the proceeding, she chose to join the remaindermen in their petition.

[3] The next question is whether the petitioners were required to show that an equitable partition of the tracts was not possible



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**Bridgers v. Bridgers**

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before the court could authorize a sale of the timber apart from the realty. We hold that they were not.

A comparison of G.S. 46-25 with other statutes is helpful. G.S. 46-22 provides for a sale of property only when "an actual partition of the lands cannot be made without injury to some or all of the parties interested." G.S. 46-26 provides for the sale of mineral interests only where "it would be for the best interests of the tenants in common . . . or if actual partition of the same cannot be had without injury to some or all of such tenants. . . ."

G.S. 46-25, on the other hand, makes no mention of a partition of the real estate. When the petitioners for a sale of standing timber are cotenants in the land, a sale of timber trees "may be had . . . upon such terms as the court may order." When the petitioner is a life tenant, the court must find "that the cutting is in keeping with good husbandry and that no substantial injury will be done to the remainder interest." In neither situation is the court required to first find that partition of the land would cause injury before it can order a sale of the standing timber. We, therefore, conclude that the present plaintiffs could seek a sale of the timber on the two tracts of land, even if an equitable division of the property was possible.

As defendants point out, G.S. 46-25 is a permissive statute. *Chandler v. Cameron, supra*. Upon a petition for the sale of standing timber, the court *may* order such a sale. A discretionary order is ordinarily not subject to review unless there has been an abuse of discretion. *GMC Trucks v. Smith*, 249 N.C. 764, 107 S.E. 2d 746 (1959). Since there is no mandate that the court grant plaintiffs' petition, defendants argue the court's denial is not subject to review unless plaintiffs show an abuse of discretion.

Defendants' argument would have merit if the Superior Court had exercised its discretion under G.S. 46-25. In denying a sale of the standing timber, however, the court concluded that G.S. 46-25 did not apply. We have held that this conclusion resulted from a misconstruction of the statute. "[W]here it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light." *State v. Grundler*, 249 N.C. 399, 402, 106 S.E. 2d 488, 490 (1959). The order is, therefore, vacated and the present record remanded

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**Supply Co. v. Dudney**

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to the Superior Court for findings and conclusions consistent with the opinion herein.

Vacated and remanded.

Chief Judge MORRIS and Judge HEDRICK concur.

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LOMAN-GARRETT SUPPLY COMPANY, INC. v. E. C. DUDNEY AND DUDNEY, INC.

No. 8118SC660

(Filed 6 April 1982)

**Guaranty § 2; Rules of Civil Procedure § 8; Seals § 1— action to enforce guaranty — failure to plead lack of consideration—summary judgment improper**

The trial court erred in granting summary judgment for plaintiff where a guaranty was signed after plaintiff had extended credit to the corporate defendant and an issue arose as to whether new consideration was required to make the guaranty enforceable. The fact that defendant failed to plead the affirmative defense of failure of consideration as required by G.S. 1A-1, Rule 8(c) did not prevent the trial court from considering the question of failure of consideration in ruling upon plaintiff's motion for summary judgment since defendant raised his defense of failure of consideration in his affidavit. Nor was the consideration defense rendered moot by the fact that the guaranty was signed under seal as the effect of a seal is not to preclude the court's consideration of the issue entirely, but only to raise a presumption of consideration which may be rebutted by clear and convincing evidence.

APPEAL by defendant from *Collier, Judge*. Judgment entered 14 April 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 March 1982.

Plaintiff first brought this action against the individual defendant alone, seeking the unpaid balance allegedly due on an account set up by defendant in the name of the corporate defendant. The plaintiff pleaded Dudney's written guaranty of the account as the basis for his liability.

The trial court denied plaintiff's motion for summary judgment, suggesting that Dudney, Inc. be joined as a necessary party. Plaintiff filed an amended complaint against both Dudney and Dudney, Inc.

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Supply Co. v. Dudney

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Dudney denied individual liability on grounds that plaintiff had failed to fulfill a condition precedent to Dudney's obligation on the guaranty, i.e. that plaintiff extend additional credit to Dudney, Inc. In his affidavit opposing plaintiff's summary judgment motion, defendant asserted that "the alleged consideration for the signing of [the] 'Guaranty of Third Persons' . . . was to be the furnishing of new credits to Dudney, Inc." and that no new credits had been extended.

The trial court granted plaintiff's second motion for summary judgment, finding the individual defendant liable for the unpaid balance of the account, plus costs and attorney's fees. Judgment was also entered against Dudney, Inc., by default after it failed to file an answer to the complaint.

Defendants appeal.

*Tuggle, Duggins, Meschan, Thornton & Elrod, by Thomas S. Thornton and Rayford K. Adams, III, for plaintiff appellee.*

*Ralph G. Jorgensen for defendant appellants.*

ARNOLD, Judge.

As their first assignment of error, defendants contend that the court erred in granting summary judgment against the individual defendant. Since the guaranty was signed after plaintiff had extended credit to the corporate defendant, new consideration was required to make the guaranty enforceable and no such consideration was given.

Plaintiff defends the court's grant of summary judgment on grounds that a guaranty under seal requires no consideration, and that, in any event, defendant failed to plead the affirmative defense of failure of consideration as required by G.S. 1A-1, Rule 8(c). Plaintiff notes that the affirmative defense which defendant did set forth in his answer, that of failure to fulfill a condition precedent, is one strongly disfavored by courts and that it was not supported by defendant's affidavit.

We agree with plaintiff that the relevant question is one of consideration, not of condition precedent. We do not agree, however, that the court could not properly consider the question of failure of consideration in ruling upon plaintiff's motion for summary judgment.

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**Supply Co. v. Dudney**

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Summary judgment is a drastic remedy which should be granted only upon a showing that there exists no material factual issue and that the movant is entitled to judgment as a matter of law. *Atkinson v. Wilkerson*, 10 N.C. App. 643, 179 S.E. 2d 872 (1971). In determining the existence of a triable issue of fact, the judge may consider verified pleadings and affidavits submitted by the parties in support thereof. Indeed, our Supreme Court has held that for the purpose of opposing a summary judgment motion an affirmative defense may be raised for the first time by affidavit. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). Defendant having raised his defense of failure of consideration in his affidavit, we hold that his failure to plead the defense was not fatal even though the preferred practice is to require a formal amendment to the pleadings. *Bassett v. Griggs*, 47 N.C. App. 104, 266 S.E. 2d 702 (1980). We note, moreover, that plaintiff was placed on notice of the substance, if not the label, of defendants' affirmative defense by the pleadings. The stated basis for defendants' claim of failure of condition precedent is precisely that which supports the defense of failure of consideration.

Even if properly raised, plaintiff argues that the consideration defense was rendered moot by the fact that the guaranty was signed under seal. It is true that a seal "imports consideration" in North Carolina. *Mobil Oil v. Wolfe*, 297 N.C. 36, 39, 252 S.E. 2d 809, 811 (1979); *First Peoples Savings & Loan Association v. Cogdell*, 44 N.C. App. 511, 261 S.E. 2d 259 (1980). However, the effect of a seal is not to preclude the court's consideration of the issue entirely as plaintiff suggests, but only to raise a presumption of consideration which must be rebutted by clear and convincing evidence. *Mills v. Bonin*, 239 N.C. 498, 80 S.E. 2d 365 (1954); *Little v. Oil Company*, 12 N.C. App. 394, 183 S.E. 2d 290 (1971). Defendant is entitled to have a jury determine whether his evidence is sufficient to rebut the presumption here since this is an issue of fact. Summary judgment was therefore improper and must be reversed.

Defendants' remaining assignments of error relating to the propriety of the court's entry of default judgment against the corporate defendant attack that judgment on purely technical grounds. We hold that any error in the judge's failure to substitute the word "Judge" for that of "Clerk" on the judgment form was harmless as a matter of law.

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**Foreman v. Bell**

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The summary judgment against E. C. Dudney in his individual capacity is reversed and the cause remanded for trial.

The default judgment against Dudney, Inc. is affirmed.

Judges CLARK and WEBB concur.

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KENNETH J. FOREMAN, JR. v. CHARLES W. BELL, LETA BAHN, FREDERICK E. BROGDON, WILLIAM GUY DELANEY, JAMES F. FORD, MARY HAMMOND, COLLIER S. HARVEY, JR., WILLIAM G. HAZEN, A. RUDOLPH HENDRICKS, C. DOOLEY HITCH, THOMAS L. JONES, III, BRYON H. KNIGHT, KATHERINE MORTON, RICHARD PORTER, HERBERT C. RULE, III, W. HERBERT SMITH, JR. CONSTITUTING THE MOUNTAIN RETREAT ASSOCIATION MANAGEMENT COUNCIL, AND THE MOUNTAIN RETREAT ASSOCIATION, INC., A NORTH CAROLINA CORPORATION

No. 8128SC460

(Filed 6 April 1982)

**Corporations § 3.1— dispute over election of directors of corporation—no jurisdiction to challenge**

G.S. 55-71 may not be used by a shareholder to challenge the selection of persons who act as trustees or fiduciaries pursuant to a separate trust agreement. Therefore, a shareholder in a corporation did not have standing to challenge the election of the Trustees of Stock, an entirely separate and independent entity from the Board of Directors of the corporation, since the business of electing Trustees of Stock was separate from that of electing directors of the Corporation.

APPEAL by plaintiff from *Allen, Judge*. Judgment entered 5 November 1980 and final judgment entered on 13 December 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 5 January 1982.

Plaintiff, a shareholder of stock in the Mountain Retreat Association, a private corporation, brought this action under G.S. 55-71 and sought to challenge thereunder the election of directors of the corporation. From an order of the superior court dismissing the plaintiff's petition, the plaintiff appeals.

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**Foreman v. Bell**

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*Bennett, Kelly & Cagle, by Harold K. Bennett, for plaintiff appellant.*

*McGuire, Wood, Worley, Bissette & Wolcott, P.A., by Richard A. Wood, Jr., and Adams, Hendon, Carson & Crow, P.A., by Samuel J. Crow, for respondent appellees.*

BECTON, Judge.

The record and exhibits in this case document in detail the history of the Mountain Retreat Association (Corporation) from its inception to the present. Much of the history of the Corporation is not necessary for the disposition of the issues before us, however. The facts essential to the resolution of this dispute are set out below.

The Corporation was originally chartered in 1897 by the North Carolina Legislature as a municipal corporation. In 1906, the Corporation became a stock corporation when the legislature amended the Corporation's charter to allow for issuance of \$500,000 of common stock and \$250,000 of preferred stock. In 1917, some owners of stock transferred their stock, pursuant to a Declaration of Trust, to a body denominated Board of Trustees of Stock. As a result of the transfers, 73 to 74 percent of the outstanding stock was held pursuant to the Declaration of Trust. The Declaration of Trust provided how and from what bodies the Trustees of Stock, numbering from 25 to 50 members, were to be elected. It also provided that the Trustees of Stock "shall have and are vested with full authority and power to change the charter" of the Corporation; that the purpose and intent of the Trust is that the Corporation's property be forever used under the auspices of the Presbyterian Church; and that the Trustees of Stock shall use, hold, vote and control the stock to insure and guarantee accomplishment of such purposes. Over the years, various amendments were made to the charter of the Corporation which affected the manner by which Trustees of Stock were elected. In 1958, the Corporation's charter was amended so that Trustees of Stock could be elected and could serve as the Board of Directors of the Corporation. In 1967, the Legislature terminated all of the Corporation's municipal rights and transferred them to the City of Montreat.

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**Foreman v. Bell**

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The plaintiff holds one share of stock in the Corporation which he acquired in 1979 by purchasing a lot and the stock certificate. He complains that the present members of the Board of Directors hold their offices illegally in that they were elected by Trustees of Stock who were not themselves properly elected. He argues that because the Trustees were not elected according to the terms of the Trust, all of their acts are null and void, including the election of directors of the Corporation. We do not consider the merits of plaintiff's arguments as we dispose of this case on jurisdictional grounds.

This action was brought pursuant to G.S. 55-71 which provides in pertinent part:

(a) Any shareholder or director of a domestic corporation may commence a summary proceeding in the superior court to determine any controversy with respect to any election or appointment of any director or officer of such corporation, and any shareholder or director of a foreign corporation authorized to transact business in this State shall have the same right with respect to any election held within this State.

This statute allows a summary procedure to be held, without the benefit of service of process, G.S. 55-71(c), whenever there is a dispute surrounding the election of corporate officers or directors. It is remedial in nature and designed to maintain the status quo while the disputes regarding an election are resolved. *Thomas v. Baker*, 227 N.C. 226, 229, 41 S.E. 2d 842, 844 (1947). Further, the statute is applicable to contested elections after the fact and not to prospective elections. *Swenson v. Assurance Co.*, 33 N.C. App. 458, 463, 235 S.E. 2d 793, 796 (1977).

The plaintiff seeks to have G.S. 55-71 applied in such a manner as to give him standing to challenge the election of the Trustees of Stock, an entirely separate and independent entity from the Board of Directors of the Corporation. We refuse to do so since the allegations in his petition and the prayer for relief do not fall within the purview of G.S. 55-71. Plaintiff, in his petition, prayed for the following relief, among others:

1. That the Court adjudge that the respondents are not legally holding the office of members of the Board of Trustees

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**Foreman v. Bell**

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of Stock, and are not legally entitled to manage the affairs of said Mountain Retreat Association as directors or in any other capacity whatever.

2. That the Court adjudge and declare that the respondents and all of their predecessors since 1972 have illegally and in violation of the Declaration of Trust and the law of North Carolina acted and voted as Trustees of Stock and as Directors of the Corporation and have thereby forfeited their right to any office either as Trustee of Stock or as Director or other officer of said corporation.

The Trustees of Stock are required by the Declaration of Trust to hold and vote the stock. These Trustees vote on directors of the Corporation at shareholders' meetings. Sometimes, the Trustees of Stock elected directors from among themselves. In fact, subsequent amendments to the Corporation's charter and by-laws provided that the same persons elected as Trustees should also be elected directors of the Corporation. How the Trustees of Stock are elected is determined by the Declaration of Trust. On its face, G.S. 55-71 pertains only to corporate elections. It does not apply to the selection of persons who hold and vote stock for others. If this were not so, G.S. 55-71 could be used by shareholders to challenge the selection of trustees of voting trusts or to challenge the selection of fiduciaries holding and voting stock for the benefit of others. The business of electing Trustees of Stock is separate from that of electing directors of the Corporation. Consequently, we hold that G.S. 55-71 may not be used by a shareholder to challenge the selection of persons who act as trustees or fiduciaries pursuant to a separate trust agreement.

We reach this result even though the Declaration of Trust was incorporated into the Corporation's charter. In 1917, the Legislature amended the Corporation's charter by including in the charter the Declaration of Trust. The provisions under the Declaration of Trust thereby became a part of the Corporation's charter, which like all other provisions in the charter, could be later amended by the stockholders. It does not matter for purposes of this suit that subsequent amendments varied from some provisions of the Declaration of Trust since the charter of the corporation governed the election of the directors of the Corporation.



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In re Appeal of Brown

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As long as the charter was properly amended by the stockholders, and we find that it has been, it does not matter that the charter and Declaration of Trust are not identical. Further, the Declaration of Trust is still binding on the Trustees of Stock, and it is this document, not the Corporation's charter, from which their fiduciary duties as Trustees of Stock arise.

Because we believe that plaintiff's petition should have been dismissed on jurisdictional grounds, rather than on substantive grounds, we

Remand for entry of judgment consistent with this opinion.

Remanded.

Judge CLARK and Judge WHICHARD concur.

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IN RE: APPEAL OF AND PETITION FOR JUDICIAL REVIEW BY C. DAVID BROWN, WENDELL HEDDEN, AND GENE MILLER, FOR THEMSELVES AND THE CITIZENS OPPOSED TO OFF-PREMISES SALE OF BEER IN ANDREWS, NORTH CAROLINA, OF THE DECISION OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, DATED AUG. 14, 1980, PERTAINING TO THE PROTEST OF THE ELECTION FOR OFF-PREMISES SALE OF BEER IN THE TOWN OF ANDREWS, NORTH CAROLINA, ON FEBRUARY 23, 1980

No. 8110SC665

(Filed 6 April 1982)

**Elections § 10— irregularities not affecting result of election**

The State Board of Elections did not err in refusing to set aside an election where it found that, although eleven persons voted who were ineligible to vote, such irregularities did not affect the result of the election, and that there was no evidence of fraud or corruption in the conduct of the election.

APPEAL by petitioners from *Bailey, Judge*. Judgment entered 26 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 3 March 1982.

Petitioners, registered voters in the Town of Andrews, contested an election held on 23 February 1980 for approval of off-premises sale of beer in the Town of Andrews. In their petition,

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petitioners alleged that certain irregularities occurred in the election. Following a hearing, the Cherokee County Board of Elections made findings of fact, which findings were submitted to the State Board of Elections for appropriate conclusions of law. The County Board declined to certify the election pending review by the State Board. The State Board directed the County Board to hold a further hearing and make additional findings of fact. The County Board complied. Following review of the findings of the County Board, the State Board entered an order certifying the election. On appeal, the Superior Court affirmed the order of the State Board. Petitioners' appeal to this Court is from the judgment of the Superior Court.

*Snyder, Leonard, Biggers & Dodd, P.A., by Gary A. Dodd, for petitioner-appellants.*

*Attorney General Rufus L. Edmisten, by Deputy Attorney General James Wallace, Jr., for respondent-appellee, State Board of Elections.*

*Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey and R. Mayne Albright for appellee-intervenors.*

WELLS, Judge.

The standard and scope of judicial review of an order of the State Board of Elections is found in the provisions of Chapter 150A of the General Statutes, the Administrative Procedure Act. G.S. 150A-51 provides:

§ 150A-51. Scope of review; power of court in disposing of case.—The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or

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**In re Appeal of Brown**

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(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification. (1973, c. 1331, s. 1.)

Petitioners do not contend that the provisions of subsection (1), (2), (3), or (6) are at issue here.

The only question properly preserved and presented in this appeal is whether the State Board's conclusions and opinion quoted below support its judgment.

1. Based upon the foregoing, the State Board of Elections concludes that certain irregularities shown on the part of the election officials are not shown to have affected the results of the election.

2. That the Board finds eleven persons voted who were not eligible to vote, but conclude that the results of the election, 379 For and 361 Against are not changed, and that the irregularities and ineligible voters shown does not require a new election.

Now therefore, the results of the election conducted in the Town of Andrews on February 23, 1980 shall be certified by this Board following the expiration of time, from the date recorded hereinbelow, stipulated in G.S. 150A-45.

In its order, the State Board found certain irregularities to have occurred in the election, but entered the following critical finding of fact:

11. There is no evidence of fraud or corruption in the conduct of the election, although there are irregularities shown which do not materially affect the results of the election.

Petitioners did not except to any finding or conclusion made by the State Board, nor does the record include any of the evidence before the State Board. The Superior Court's conclusion

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**State v. Surgeon**

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that the Board's findings and conclusions were supported by substantial competent and material evidence is, therefore, binding on appeal. *Tinkham v. Hall*, 47 N.C. App. 651, 267 S.E. 2d 588 (1980), *Bethea v. Bethea*, 43 N.C. App. 372, 258 S.E. 2d 796 (1979), *disc. rev. denied*, 299 N.C. 119, 261 S.E. 2d 922 (1980).

It is settled law that an election will not be disturbed for irregularities where it is not shown that such irregularities are sufficient to alter the result. *Gardner v. Reidsville*, 269 N.C. 581, 153 S.E. 2d 139 (1967); *Starbuck v. Havelock*, 255 N.C. 198, 120 S.E. 2d 440 (1961); *Overton v. Comrs. of Hendersonville*, 253 N.C. 306, 116 S.E. 2d 808 (1960). *See also Green v. Briggs*, 243 N.C. 745, 92 S.E. 2d 149 (1956). This often-stated rule of elections law clearly applies in this case.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges HILL and BECTON concur.

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**STATE OF NORTH CAROLINA v. MELVIN SURGEON**

No. 8112SC1045

(Filed 6 April 1982)

**Criminal Law § 34.8— evidence of prior crimes—proper to show common plan or scheme**

In a prosecution for armed robbery, evidence of defendant's previous involvement in unspecified armed robberies tended to establish a common plan or scheme to use a weapon during the commission of robbery for the purpose of obtaining money and was properly admissible.

APPEAL by defendant from *Clark, Judge*. Judgment entered 22 April 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 5 March 1982.

The defendant, Melvin Surgeon, was indicted on two counts of armed robbery, convicted of both charges, and given consecutive prison sentences of 30 years to life and 22 to 30 years. Both robberies occurred within a six-hour period on 3 December

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State v. Surgeon

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1980, the first being at Auto Insurance and the second being at Beck's Motel.

*Attorney General Edmisten, by Assistant Attorney General Reginald L. Watkins, for the State.*

*Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.*

BECTON, Judge.

The sole issue on appeal is whether the trial court erred in admitting evidence of prior crimes committed by defendant. Before discussing the applicable rules of law, we set out first, in context, the challenged testimony:

[A.] [The defendant] made a statement to me regarding the robbery of Beck's Motel. He said that he did Beck's Motel alone except for the person who was driving the car. I asked him if it was a man or woman and he wouldn't tell me. He would not implicate anyone else in any of the other crimes.

Q. Did you ask him about any other robbery here in Fayetteville?

A. Yes, I did.

Q. And did he make any statement about any other robbery here in Fayetteville?

A. Yes, he did. Several others.

Q. Did he make any other statements about robbery in general?

A. He said that he usually stuck with armed robbery—

MR. MORRIS: Your Honor, I'm going to object to all this. This has got nothing to do with the alleged offenses.

COURT: Overruled, sir, on those grounds.

A. He said that he usually stuck with armed robberies.

MR. MORRIS: Well, objection.

COURT: Overruled.

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State v. Surgeon

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MR. MORRIS: Motion to strike.

COURT: Denied, sir.

We must determine whether the trial court properly admitted this evidence of other crimes as being relevant to the issues in the case *sub judice*. Since evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule is this: In a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense, even though the other offense is of the same nature as the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, "[t]he general rule excluding evidence of the commission of other offenses by the accused is subject to certain well-recognized exceptions, which are . . . founded on as sound reasons as the rule itself." *Id.* at 174, 81 S.E. 2d at 366. Two of the exceptions enunciated in *McClain* are "motive" and "a common plan or scheme." With regard to these two exceptions, the McClain Court said:

5. Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible even though it discloses the commission of another offense by the accused. [Citations omitted.]

6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. [Citations omitted.] Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

*Id.* at 176, 81 S.E. 2d at 367. In the case *sub judice* the defendant's statement acknowledges previous involvement in unspecified armed robberies and tends to establish a common plan or scheme to use a weapon during the commission of a robbery for the purpose of obtaining money. On the basis of *McClain* we believe the challenged testimony to be relevant. See *State v. Carey*, 288 N.C. 254, 269-70, 218 S.E. 2d 387, 397 (1975), *death*

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Rhoads v. Bryant

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*sentence vacated* 428 U.S. 904, 49 L.Ed. 2d 1209, 96 S.Ct. 209 (1976), and *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975). To state our position differently, we quote from Judge Erwin's opinion in *State v. Judge*, 49 N.C. App. 290, 291, 271 S.E. 2d 89, 90 (1980):

The test of the relevancy of evidence "is whether it tends to shed any light on the subject of the inquiry or has as its only effect the exciting of prejudice or sympathy." *State v. Braxton*, 294 N.C. 446, 462, 242 S.E. 2d 769, 779 (1978). Evidence offered by the State, which tends to prove a relevant fact, "will not be excluded merely because it also shows defendant to have been guilty of an independent crime. [authorities omitted] Where evidence tends to prove a motive on the defendant's part to commit the crime charged, it is admissible even though it discloses the commission of another offense by the defendant." *State v. Cherry*, 298 N.C. 86, 109, 257 S.E. 2d 551, 565 (1979).

In the defendant's trial, we find

No error.

Judge WELLS and Judge HILL concur.

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ELIZABETH M. RHOADS, PLAINTIFF v. FLETCHER BRYANT, DEFENDANT AND  
THIRD PARTY PLAINTIFF v. D. EDWIN RHOADS, JR., THIRD PARTY DEFENDANT

No. 816SC750

(Filed 6 April 1982)

**Automobiles § 95.2— admissions of automobile ownership and of driver's negligence—summary judgment proper for third party**

In an action in which plaintiff sought to recover for injuries sustained when an automobile in which she was a passenger hit a bull, admissions establishing plaintiff's ownership of the automobile and third party defendant's negligence in driving it established plaintiff's contributory negligence as a matter of law, thus defeating her claim against defendant.

APPEAL by plaintiff from *Fountain, Judge*. Judgment entered 18 February 1981 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 12 March 1982.

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**Rhoads v. Bryant**

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Plaintiff appeals from the trial court's grant of summary judgment for defendant as to plaintiff's negligence action. The facts of the case will be discussed in the body of the opinion.

*Thomas L. Jones, for plaintiff-appellant.*

*Baker and Jones, by Ronald G. Baker, for defendant-appellee.*

WELLS, Judge.

The factual and procedural history of this case is as follows. At approximately 9:30 p.m. on 6 September 1978, plaintiff and her husband, both Virginia residents, were driving on a dark, rural road in Northampton County, North Carolina. Plaintiff owned the car which her husband was driving. A bull owned by defendant was standing in the middle of the unlit road; plaintiff's car struck the bull, and as a result, plaintiff suffered personal injury. Plaintiff instituted this action against defendant, a North Carolina resident, alleging that defendant knew the bull had escaped before, and negligently had allowed the bull to roam at large in violation of G.S. 68-16. Defendant filed an answer denying negligence, and filed a third party complaint against plaintiff's husband, alleging that he had been negligent in driving recklessly, above the speed limit, and without maintaining a proper lookout. Defendant also prayed for damages from third party defendant for the value of his bull. In an amendment to his complaint, defendant also alleged that the negligence of third party defendant should be imputed to plaintiff, owner of the automobile, in bar of her claim.

Prior to the institution of her claim against defendant, plaintiff had brought an action against her husband in the Virginia courts, alleging the negligence of her husband in driving her car. The Virginia action terminated when plaintiff gave her husband a covenant not to sue for the consideration of \$6,000.00.

Pursuant to discovery in the North Carolina action, defendant filed requests for admissions by plaintiff, under the provisions of G.S. 1A-1, Rule 36(b) of the Rules of Civil Procedure. In response, plaintiff admitted the truth of the following relevant allegations in her motion for judgment in the Virginia action:

7. That at the said time and place aforesaid, the defendant, Rhoads, carelessly, recklessly and in a negligent manner did fail to drive at a reasonable speed under the circum-



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**Rhoads v. Bryant**

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stances and conditions existing at the time, fail to keep his vehicle under reasonable and proper control at all times; fail to apply brakes in order to avoid hitting an animal in the road; fail to maintain and keep a reasonable and proper lookout, and otherwise fail to obey and comply with the traffic laws and statutes of the Commonwealth of Virginia for such cases made and provided.

. . .

11. That notwithstanding the duties [of Bryant] as aforesaid, the defendant, Rhoads, carelessly, recklessly and in a negligent manner failed to operate said vehicle at a reasonable and proper speed under the circumstances and conditions existing at the time, failed to keep said vehicle under reasonable and proper control at all times, failed to maintain and keep a reasonable and proper lookout; failed to apply brakes and slow down, and failed to obey and comply with the traffic laws and statutes of the Commonwealth of Virginia for such cases made and provided.

Plaintiff also admitted that she owned the automobile which her husband was driving, and that she was riding in the front seat as a passenger at the time of the accident. Based on these admissions, defendant moved for summary judgment. Plaintiff submitted an affidavit stating that "[p]laintiff's husband did everything he could to avoid colliding with said bull." Judge Fountain granted defendant's G.S. 1A-1, Rule 56 motion, and also dismissed plaintiff's claim with prejudice.

Plaintiff's argument on appeal is that there were outstanding, material issues of fact in regard to defendant's negligence in allowing his bull to escape into a public road, which rendered entry of summary judgment improper. We do not agree. The effect of an admission made pursuant to a Rule 36(b) request is that: "Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Plaintiff made no motion to withdraw or to amend the admissions she made in response to defendant's requests for admissions during discovery. Plaintiff's affidavit opposing summary judgment does not overcome the conclusive effect of her previous admissions, and, therefore, no issue of fact is raised by

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**Carolina Builders v. Gelder & Associates**

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her assertion that her husband did everything he could to avoid the collision.

The next issue, then, is the effect of the admissions of plaintiff's ownership of the automobile and of third party defendant's negligence in driving it on plaintiff's claim against defendant. Where the driver's negligence has been conclusively established, in the absence of any rebuttal evidence on agency, the driver's negligence is imputed to an owner who was a passenger in the automobile at the time of the collision. *Randall v. Rogers*, 262 N.C. 544, 138 S.E. 2d 248 (1964); *Industries, Inc. v. Tharpe*, 47 N.C. App. 754, 268 S.E. 2d 824 (1980), *disc. rev. denied*, 301 N.C. 90, 273 S.E. 2d 311 (1980); *Hearne v. Smith*, 23 N.C. App. 111, 208 S.E. 2d 268 (1974); *cert. denied*, 286 N.C. 211, 209 S.E. 2d 315 (1974); *see generally*, 2 Strong's N.C. Index 3d, Automobiles, § 95.2; Annot., 50 A.L.R. 2d 1281. The effect of this imputed negligence is to establish plaintiff's contributory negligence as a matter of law, thus defeating plaintiff's claim against defendant. *Industries, Inc. v. Tharpe*, *supra*; *Hearne v. Smith*, *supra*. For the reasons stated, the trial court did not err in granting summary judgment for defendant.

Affirmed.

Judges HILL and BECTON concur.

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CAROLINA BUILDERS CORPORATION v. GELDER & ASSOCIATES, INC.,  
CLARENCE W. GELDER AND EDGAR R. BAIN, SUBSTITUTE TRUSTEE

No. 8110SC415

(Filed 6 April 1982)

**Rules of Civil Procedure § 15— failure to allow amendment of complaint—error**

In an action to enjoin the foreclosure of two deeds of trust on lands owned by plaintiff, the trial court erred as a matter of law in failing to rule on plaintiff's motion to amend its complaint before granting defendants' motion for summary judgment where the motion to amend was filed less than four months after the original complaint and eight months before the hearing on defendants' motion for summary judgment.

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**Carolina Builders v. Gelder & Associates**

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APPEAL by plaintiff from *Canady, Judge*. Judgment entered 30 October 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 8 December 1981.

Plaintiff commenced this action on 26 October 1979 to enjoin the foreclosure of two deeds of trust on lands owned by plaintiff. In its original complaint plaintiff alleged that defendant Clarence Gelder had acquired, by assignment, two deeds of trust and the accompanying promissory notes, which constituted liens on a 16.4 acre tract of land owned by plaintiff. The notes were executed to obtain funds with which to develop the Idlewood Village Subdivision in Wake County, North Carolina. The deeds of trust securing the notes covered numerous lots in the Subdivision in addition to plaintiff's property.

When the notes became delinquent, Gelder threatened to foreclose on plaintiff's property. Plaintiff contended that Gelder released five Subdivision lots, owned by defendant Gelder & Associates, Inc., from the lien of the deeds of trust without requiring payment of the release fees that were required by specified loan agreements that were incorporated by reference in the deeds of trust. According to plaintiff, Gelder thereby cast a greater burden of payment for the remaining balance of the notes on plaintiff's property. Plaintiff, therefore, asked the court (1) to enjoin Gelder's foreclosure of the deeds of trust and (2) to require Gelder to credit against the notes the proper release payments.

Defendants filed answer on 26 November 1979 and moved for summary judgment on 30 November 1979.

On 18 February 1980, prior to a hearing on defendants' summary judgment motion, plaintiff filed a motion to amend its complaint on the ground that since the filing of its original complaint it had obtained previously unobtainable documents which established an additional basis for its claim against defendants. Plaintiff also tendered an amended complaint with supporting exhibits.

The amended complaint set forth a second cause of action based upon two additional provisions in the loan agreements underlying the deeds of trust and providing for the cancellation of the deeds of trust covering plaintiff's property at the borrower's option following release by the lender of a certain number of Sub-

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**Carolina Builders v. Gelder & Associates**

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division lots from the lien of the deeds of trust. Plaintiff alleged that the requisite number of lots had been released and that it was therefore entitled to enforce the cancellation provisions. Attached to the amended complaint were copies of the aforementioned loan agreements.

Without ruling on plaintiff's motion to amend its complaint, the trial court allowed defendants' motion for summary judgment. Plaintiff has appealed.

*Joslin, Culbertson, Sedberry & Houck, by William Joslin, for plaintiff appellant.*

*Edgar R. Bain and Elaine F. Capps for defendant appellee.*

BECTON, Judge.

Plaintiff assigns error to the trial court's failure to rule on the motion to amend its complaint. The trial court apparently gave no consideration to the amended complaint in ruling on the summary judgment motion for it refused to allow plaintiff to include it in the record on appeal. We subsequently allowed plaintiff to file it as an amendment to the record pursuant to App. R. 9(b)(6).

We hold that the trial court's failure to rule on the motion to amend was error as a matter of law and that the trial court prematurely ruled on defendant's motion for summary judgment.

"The Rules of Civil Procedure achieve their purpose of insuring a speedy trial by providing for and encouraging liberal amendments to pleadings under Rule 15." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 714, 220 S.E. 2d 806, 809 (1975), *cert. denied*, 289 N.C. 619, 223 S.E. 2d 396 (1976). Failure to rule on a motion to amend contravenes this purpose by inviting piecemeal litigation and preventing consideration of the merits of the action on all the evidence available. *See Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), *disc. review denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979); *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E. 2d 420 (1972).

We further hold that in this case the motion to amend should have been allowed. Rule 15(a) of the Rules of Civil Procedure states that leave to amend pleadings "shall be freely given when

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justice so requires." See *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978); see also *Foman v. Davis*, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962).

In the present case, we perceive no apparent reason why the motion to amend should not have been allowed, and the trial court stated none. In *Public Relations, Inc.*, we found neither undue delay nor prejudice when the plaintiff filed a motion to amend its complaint so as to allege personal jurisdiction over the defendant approximately six weeks after the defendant had filed a motion to dismiss for lack of jurisdiction *and one day after the trial court had allowed that motion to dismiss*. In the present case the motion to amend was filed less than four months after the original complaint and eight months before the hearing on defendants' motion for summary judgment. It is conceivable that it took plaintiff four months to obtain, through discovery, the documents necessary to support the new claim contained in the amended complaint. Allowance of the amendment will not prejudice defendants as they will have ample opportunity to respond to it. Nor can we say that allowance of the motion to amend would be futile even though upon remand the trial court may determine that plaintiff cannot recover on the claim asserted in the amended complaint.

Entry of summary judgment in favor of defendants is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judge CLARK and Judge WHICHARD concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 APRIL 1982

HAYNES v. LITTLE PIGS No. 8128SC516	Buncombe (79CVS593)	No Error
HENSLEY v. THOMAS No. 8129SC790	McDowell (77CVS224)	Appeal Dismissed
IN RE ATWATER No. 8115SC687	Orange (80CVS697)	Affirmed
IN RE LONG No. 8110DC1110	Wake (81SP528)	Affirmed
IN RE McNAIR v. ESTES No. 8126SC649	Mecklenburg (81CVS2663)	Affirmed
MARLEY v. TILLES No. 8119SC739	Randolph (79CVS127)	Affirmed
PHOENIX v. BD. OF ALDERMEN No. 8119SC676	Cabarrus (81CVS351)	Affirmed
SCHLOSSER v. SCHLOSSER No. 8121DC479	Forsyth (79CVD3921)	Reversed & Remanded
SPRINKLE v. WHEELER No. 8128SC691	Buncombe (79CVS2978)	New Trial
STATE v. AVERY No. 813SC890	Carteret (80CRS7149) (80CRS7150)	No Error
STATE v. BAILEY No. 817SC899	Nash (80CRS10608)	No Error
STATE v. BANKS No. 8110SC1013	Wake (80CRS68931)	No Error
STATE v. BUTNER No. 8121SC956	Forsyth (81CR1506)	No Error
STATE v. EARLEY No. 814SC1120	Onslow (81CRS4351)	No Error
STATE v. FREEMAN No. 8120SC1027	Moore (81CRS640) (81CRS1431)	Affirmed
STATE v. HARDY No. 8121SC1098	Forsyth (81CRS8208)	No Error

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STATE v. HARMON No. 8128SC1028	Buncombe (80CRS23843) (80CRS23844)	No Error
STATE v. HARPER No. 813SC1049	Pitt (80CRS11923)	No Error
STATE v. HARRISON No. 814SC1057	Onslow (81CRS2044)	No Error
STATE v. McCULLERS No. 8110SC942	Wake (80CRS66267)	No Error
STATE v. O'MALLEY No. 814SC1130	Onslow (80CRS23182) (80CRS23184)	No Error
STATE v. PAGE No. 8114SC789	Durham (80CRS24867)	No Error
STATE v. PINNIX No. 8115SC762	Alamance (80CRS13846)	Reversed
STATE v. REYNOLDS No. 8119SC1046	Randolph (80CRS12382) (80CRS12383)	No Error
STATE v. WHITE No. 8112SC1018	Cumberland (80CRS28050) (80CRS28388) (80CRS28389) (80CRS28471)	Affirmed
TALAFERRO v. WRIGHT No. 8115DC671	Orange (78CVM58)	Reversed & Remanded for Trial
WALSER v. WALSER No. 814DC745	Onslow (80CVD993)	Affirmed
WILLIAMS v. COLEMAN No. 816SC661	Hertford (79CVS41)	Affirmed

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**The Property Shop v. Mountain City Investment Co.**

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THE PROPERTY SHOP, INC. v. MOUNTAIN CITY INVESTMENT COMPANY

No. 8128SC641

(Filed 6 April 1982)

**1. Rules of Civil Procedure § 32— compelling defendant to offer certain portions of deposition into evidence**

Where defendant offered part of a deposition into evidence, the trial court did not err in compelling defendant to offer certain additional deposition testimony relevant to that already in evidence. G.S. 1A-1, Rule 32(a)(5).

**2. Brokers and Factors § 1.1— knowledge that broker procuring cause of sale— instructions concerning**

In an action concerning a real estate commission, the trial judge did not err in failing to give instructions on the duty of a broker to inform a seller that a prospective purchaser was procured by the broker's efforts since the issue before the jury was whether the seller knew or should have known that the broker was the procuring cause of the sale, and the court properly instructed on that issue.

**3. Brokers and Factors § 6— breach of broker's contract— instructions concerning damages**

In an action concerning a real estate broker's commission, the trial court properly instructed that if the jury reached the damage issue, it would have already determined that the parties had entered into an agreement for the payment of a commission of six percent of the sales price of the property. The evidence was uncontroverted that the owner of the property told the broker that the "prospective price" for the property was \$750,000 and that plaintiff would receive a six percent commission, and though the owner subsequently accepted \$710,000 for the motel, the broker performed the service of producing a buyer who consummated the sales transaction to the satisfaction of the owner.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 22 January 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 February 1982.

This is an action by plaintiff to recover a real estate commission on the sale of defendant's property to a purchaser allegedly procured by plaintiff.

Plaintiff alleged in its amended complaint that defendant listed the Downtowner Motel in Asheville with plaintiff at a sales price of \$750,000 with a 6% commission; that plaintiff produced a purchaser who was ready, willing and able to buy defendant's property; that the purchaser, Bhagu Patel, purchased the motel for \$710,000; that the contract to purchase the property contained



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a provision in which the buyer warranted he had not been represented by a realtor entitled to a commission; that defendant refused to pay a real estate commission to plaintiff after the sale was completed; and that plaintiff was entitled to recover \$42,600 (6% of \$710,000), plus interest.

Defendant's answer denied the material allegations of the complaint.

At trial, plaintiff's evidence was as follows: Bernard Goldstein (hereinafter "Goldstein"), president of defendant company, is Ellen Goldstein's (hereinafter "Ellen") uncle by marriage. Defendant owned the Downtowner Motel in Asheville and its Board was discussing selling the motel. Ellen was a broker with plaintiff realty company. In February 1978 Goldstein agreed to allow Ellen to find a purchaser for the motel. The terms were a sales price of \$750,000 with \$200,000 down payment, and a commission to plaintiff of 6%. Defendant never executed the exclusive listing agreement prepared by plaintiff. Ellen obtained financial information on the motel from Jim Crawford, manager of the motel.

Ellen contacted Allied Business Brokers in Asheville and through them reached Frank Dostal, a broker in Macon, Georgia. Dostal brought Paul Patel to Asheville in August 1978 to look at the motel. Paul Patel made an offer for the motel. The offer was written on a form with the heading showing Dostal's Macon real estate company and listed Dostal as salesman. Glenn Snipes, Secretary of defendant, rejected the offer as being too low. Goldstein was given a copy of this offer.

In September Ellen told Goldstein that Dostal was bringing another client to see the motel and set up a meeting with the officers on 4 October 1978. Dostal arrived with the client, Bhagu Patel (hereinafter "Patel"), and they registered at the motel. Dostal informed Ellen that Patel was not interested in the motel and cancelled the meeting. Ellen learned in November that Patel had purchased the motel.

Several months after the sale, Dostal told Ellen that he had taken Patel to Waynesville on 4 October 1978 to meet Aaron Prevost, Vice President of defendant. Dostal introduced himself and told Prevost that he was working with plaintiff to secure a buyer for the motel. Prevost told Dostal that there was no listing

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contract with plaintiff. After hearing this, Dostal left the room, and Patel and Prevost made arrangements for the sale. Bhagu Patel later offered Dostal \$500 "to keep his mouth shut."

Goldstein learned from Prevost that Dostal was with Patel when they discussed purchase of the motel. He told Ellen to let the sale go through and that something would work out later concerning the commission because Patel would probably have to pay it due to the indemnity clause in the sales agreement.

Defendant's evidence was as follows: Goldstein testified that before the contract was signed, neither Ellen nor anyone else told Goldstein that Patel was the man to whom Dostal had shown the motel. Goldstein knew that Dostal was a broker who was trying to sell the motel, and he knew that Patel had come to Asheville with Dostal. Patel told Goldstein he was not represented by any broker and voluntarily signed a statement to that effect.

Jim Crawford, manager of the motel, testified that when Dostal could not reach Goldstein or Snipes on October 4, he suggested Dostal contact Prevost in Waynesville. Crawford called Prevost and told him there was a broker at the motel who had shown the property with Ellen and who was unable to contact Goldstein or Snipes. Dostal, Patel and Prevost agreed to meet in Waynesville to discuss the motel. Prevost and Snipes both knew that Ellen was trying to sell the motel, but they believed that defendant had not listed the property with any broker. Dostal told Prevost he had no interest in the matter, and Patel signed a statement that no broker was involved.

By deposition Bhagu Patel stated that he learned that the Downtowner was for sale through a cousin in High Point, Sombahai Patel. Dostal asked to go along with Patel to show him other property in Atlanta and Asheville. Plaintiff moved the court pursuant to Rule 32 of the North Carolina Rules of Civil Procedure to require defendant to offer certain portions of Patel's deposition, which motion was granted. In this further testimony Patel stated that he told Dostal he was going to look at the Downtowner. Dostal did not tell Patel that he had a listing on that motel and did not tell him that he had set up a meeting with the officers to discuss the sale of the motel. Neither Dostal nor Prevost ever mentioned plaintiff to Patel. Patel did not learn of the Downtowner through Paul Patel.

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In rebuttal, Dostal testified that Bhagu Patel called him and said that he had been given Dostal's name by Paul Patel. Dostal sent Bhagu Patel financial information on the Downtowner and showed him the offer made by Paul Patel. Dostal told Prevost he was not working for Patel, but represented the sellers of the property.

The jury's verdict was that the parties entered into an agreement in which defendant agreed to pay plaintiff a commission if plaintiff sold defendant's property; that plaintiff procured a ready, willing and able purchaser; that defendant knew or should have known before the sale of the property that plaintiff had procured the purchaser; and that plaintiff was entitled to recover \$42,600 from defendant. Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied. Defendant appeals.

*Bennett, Kelly & Cagle by Harold K. Bennett for plaintiff appellee.*

*Adams, Hendon, Carson & Crow by George Ward Hendon for defendant appellant.*

CLARK, Judge.

Defendant first argues that the court erred in excluding portions of Bhagu Patel's testimony. Patel was allowed to testify that he learned of the Downtowner in a conversation with his cousin, Sombahai Patel, who lived in High Point. The court excluded Patel's testimony that his cousin said the property was nice and the reasons his cousin did not want to buy the property himself. We do not believe that the excluded statements were material or that excluding the testimony was prejudicial to defendant. *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892 (1954). We find no merit to this exception and overrule it.

[1] Likewise, we find no merit in defendant's next argument that the trial court erred in compelling defendant to offer into evidence certain portions of the Bhagu Patel deposition. Defendant offered portions of the deposition concerning how Patel learned of the Downtowner's availability, his trip to Asheville, his meeting in Waynesville with Prevost, and his subsequent negotiations to purchase the motel. Upon plaintiff's motion, the court required de-

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fendant to offer certain additional testimony relevant to that already in evidence and which concerned how Patel became acquainted with Frank Dostal and details of their arrangements to go to Asheville together to look at several motels. We think the court properly required defendant to introduce these portions of the deposition pursuant to G.S. 1A-1, Rule 32(a)(5), which reads as follows:

"If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced, and any party may introduce any other parts."

We find that the additional testimony was relevant to portions of the deposition defendant had previously introduced and therefore overrule this exception.

Defendant argues that the trial court erred in overruling its objection to the jury argument by plaintiff's counsel in which he stated that Bhagu Patel might have to pay any bill in the case. G.S. 84-14 states that "In jury trials, the whole case as well of law as of fact may be argued to the jury." The general rule is that counsel may argue all the evidence to the jury, as well as any reasonable inferences to be drawn from it. *Crutcher v. Noel*, 284 N.C. 568, 201 S.E. 2d 855, *reh. denied*, 285 N.C. 597 (1974). In the case *sub judice*, the offer to purchase which was introduced into evidence stated that Buyer (Bhagu Patel) was not represented by a realtor and that he would "warrant and defend the Seller against any of the said types of fees or commissions." Also, Ellen Goldstein was allowed to testify without objection that Bernard Goldstein told her to let the sale go through because Patel would probably have to pay the commission due to the indemnity clause. We hold, therefore, that the trial court properly overruled defendant's objection since plaintiff's counsel was arguing facts which had been admitted into evidence without objection. We overrule this assignment of error.

[2] Defendant next assigns as error the failure of the trial court to give special instructions it had requested concerning the duty of a real estate broker to inform the property owner that it is the broker's prospect with whom the owner is negotiating. The duty of the trial judge is to declare the law arising on the evidence and to explain the application of the law to that evidence. G.S. 1A-1,

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Rule 51(a). When a party tenders a written request for a specific instruction which is correct and supported by evidence, the failure of the court to give the instruction in substance is error. *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 192 S.E. 2d 1 (1972).

We believe that the trial court properly instructed the jury on the law applicable to this issue. We do not agree with defendant that the judge should have given instructions on the duty of a broker to inform a seller that a prospective purchaser was procured by the broker's efforts. Rather, the issue before the jury was whether the seller knew or should have known that the broker was the procuring cause of the sale. The court instructed the jury on this issue as follows:

"The third issue, members of the jury, reads as follows: . . . did the defendant prior to the sale of defendant's property know or should it have known by the exercise of reasonable diligence that the plaintiff procured the purchaser. On this issue, members of the jury, the burden of proof, as I have defined that term, is upon the plaintiff to prove to you, the jury, from the evidence and by its greater weight that the defendant knew prior to the sale of its property or should have known by the exercise of reasonable diligence that the purchaser of its property had been procured by the plaintiff.

If the seller of property, instead of negotiating or dealing with the broker, deals directly with the purchaser knowing that the purchaser was sent to him by the broker or someone acting through the broker, then the seller would be liable to the broker for commissions agreed upon upon a sale of such property, or upon a showing that such purchaser was ready, willing, and able to purchase upon terms agreed upon between the seller and broker. . . . If the broker knows that the seller is negotiating with one the broker procured to purchase the property, and the broker has reasonable cause to believe that the seller does not know the broker procured such purchaser, the broker would have a duty to notify the seller of such fact to the end that the seller might not be misled into accepting a reduced price for the property on the theory that he would not be obligated as a result of a sale to pay real estate commissions. And if so knowing, the broker

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fails to act to notify the seller, then in such event the broker would not be entitled to recover its commissions, for it would not have performed its obligations under the contract.

If, however, the broker does not know that the seller is negotiating with a purchaser procured by the broker, then in such event the broker would not be required to notify the seller for the law would not require the doing of something or the notification to someone of an act about which the broker had no knowledge. Even if the seller did not actually know that it was dealing with a purchaser procured by the broker and the seller in fact negotiates with a purchaser procured by the broker, the seller nevertheless would be liable for commissions if it could have ascertained with the exercise of reasonable diligence that the broker was in fact the procurer of the purchaser. What is reasonable diligence in ascertaining whether the seller should have known it was dealing directly with a person procured by the broker depends upon the facts and circumstances as you find them to have existed from the evidence at the times in question. Such circumstances include the conduct, statements and acts of the parties, including the acts and declarations of the purchaser to the effect that no broker was involved. However, the mere fact that the purchaser declares or states that no broker is involved standing alone is not sufficient to free the seller of its duty to ascertain that which the exercise of reasonable diligence would have revealed. The exercise of reasonable diligence is such diligence as a reasonably careful and prudent person under the same or similar circumstances would have exercised. . . .

If one of the officers of the defendant corporation knew or should have by the exercise of reasonable diligence ascertained that the purchaser with whom it dealt was procured in fact by the broker, then the corporation is chargeable with such knowledge whether other officers of the corporation knew it or not or should have known it or not by the exercise of reasonable diligence."

It is the general rule that a broker who is the procuring cause of a sale of property is entitled to a commission even though the owner himself makes the sale, unless the provisions of

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the contract of employment provide otherwise. *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486 (1968); *Jaudon v. Swink*, 51 N.C. App. 433, 276 S.E. 2d 511 (1981). The plaintiff presented ample evidence which tended to show that defendant through its officers had notice that Bhagu Patel was procured as a buyer through the efforts of Frank Dostal. Defendant's evidence contradicted much of plaintiff's evidence, and therefore the issue properly before the jury was whether or not defendant knew or should have known of the broker's involvement. The credibility of each party's witnesses was properly a question for the jury upon all the evidence presented. We find that the court's instructions were proper and therefore overrule this assignment of error.

[3] Defendant's final assignment of error concerns the court's instructions to the jury on the measure of damages recoverable. Defendant submits that there was an express contract to recover a commission of six percent if the sales price was \$750,000, not to recover six percent of the ultimate sales price, regardless of the amount. The fourth issue submitted to the jury concerned the amount plaintiff was entitled to recover of defendant. The trial court instructed that if the jury reached this issue, it would have already determined that the parties had entered into an agreement for the payment of a commission of six percent of the sales price of the property. The jury found that plaintiff was entitled to a recovery of \$42,600, six percent of the \$710,000 sales price.

The general rule is that if property is listed with a broker for sale and sale is brought about through the broker as procuring cause, he is entitled to a commission even though the final negotiations are conducted through the owner who accepts a price less than that stipulated to the broker. *Thompson v. Foster*, 240 N.C. 315, 82 S.E. 2d 109, 46 A.L.R. 2d 843 (1954); Annot., 46 A.L.R. 2d 848 (1956). "The law does not permit an owner 'to reap the benefits of the broker's labor without just reward' if he has requested a broker to undertake the sale of his property and accepts the results of services rendered at his request. In such case, *in the absence of a stipulation as to compensation*, he is liable for the reasonable value of those services." (Emphasis added.) *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, *supra*, at 251, 162 S.E. 2d at 491. *Realty Agency* allowed recovery on *quantum meruit* to a broker who had expended time and efforts to sell defendant's

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property, but in that case the broker did not find the prospect to whom the owner sold the property. Justice Sharp stated that "[t]his is not a situation in which an owner, who has listed real estate with the broker at a specified price, reduces the price and sells it to the broker's prospect. When that occurs, clearly the broker is entitled to compensation." *Id.* at 251, 162 S.E. 2d at 491.

Other decisions cited by defendant which allowed recovery on *quantum meruit* do not fit the facts of the case here presented. In *Thompson v. Foster, supra*, the listing agreement provided that the broker should receive for his services any sum for which the property sold in excess of \$50,000. The owner dealt directly with the broker's prospect and sold the property to this prospect for \$50,000. Therefore, the owner's acceptance of this price deprived the broker of his commission, and the broker was allowed to recover the reasonable value of his services. In *White v. Pleasants*, 225 N.C. 760, 36 S.E. 2d 227 (1945), *quantum meruit* recovery was allowed where there was an oral listing contract stipulating a sales price but setting no rate of compensation to the broker. See also *Lindsey v. Speight*, 224 N.C. 453, 31 S.E. 2d 371 (1944); *Aiken v. Collins*, 16 N.C. App. 504, 192 S.E. 2d 617 (1972).

The rule allowing *quantum meruit* recovery applies where no particular rate of commission is stipulated or specified in the listing agreement between the owner and the broker; but as a general rule when a sale is made by the owner at a price less than the broker is authorized to offer, the commission allowed is the contract rate on the actual sale price. *Baker v. Curtis*, 105 Cal. App. 2d 663, 234 P. 2d 153 (1951); *MacGregor v. Persha*, 174 Minn. 127, 218 N.W. 462 (1928); *Portney v. Frank*, 77 Ohio App. 357, 65 N.E. 2d 290 (1946); *Andrews v. Newton*, 118 Vt. 290, 108 A. 2d 517 (1954); Annot., 46 A.L.R. 2d 848 (1956). This general rule should be adopted in North Carolina because the agreed rate of commission accurately reflects the value of the services which the owner and broker considered fair and reasonable and is determinable with less difficulty than under the somewhat nebulous *quantum meruit* rule.

In the case *sub judice* the evidence is uncontroverted that Bernard Goldstein told Ellen that the "prospective price" for the motel was \$750,000 and that plaintiff would receive a six percent



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**Lumpkins v. Fieldcrest Mills**

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commission. Though the owner subsequently accepted \$710,000 for the motel, the broker performed the service of producing a buyer who consummated the sales transaction to the satisfaction of the owner, and in light of the agreed commission rate the broker is entitled to recover six percent of the actual sales price as compensation. Though defendant does not question the validity of the oral listing, we note that oral contracts between broker and owner to negotiate the sale of land are not subject to the Statute of Frauds and are not required to be in writing. *Thompson-McLean, Inc. v. Campbell*, 261 N.C. 310, 134 S.E. 2d 671 (1964). Unquestionably, a written listing by the owner with the real estate broker is desirable, and a written listing may be required by Rule .0106 of the North Carolina Real Estate Licensing Board adopted pursuant to the authority of G.S. 93A-6(a)(15). We find no error in the trial court's instructions on the fourth issue.

The jury has spoken, and we find no prejudicial error in the trial.

No error.

Judges ARNOLD and WHICHARD concur.

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JUNIOR C. LUMPKINS, EMPLOYEE v. FIELDCREST MILLS, EMPLOYER, SELF-INSURED

No. 8110IC628

(Filed 6 April 1982)

**Master and Servant § 68— occupational disease—finding of insufficient causation—conclusive on appeal**

In a workers' compensation proceeding, evidence that plaintiff's employment was merely a "possible etiologic factor" in causing his lung disease, supported the Commission's finding that plaintiff's lung disease had an insufficient causal relationship with his employment to grant him compensation and the Commission's conclusion must be affirmed.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award entered 24 February 1981. Heard in the Court of Appeals 11 February 1982.

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**Lumpkins v. Fieldcrest Mills**

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Plaintiff filed a claim for workers' compensation benefits alleging that he is "suffering from an occupational disease caused by exposure to cotton dust." Deputy Commissioner W. C. Delbridge found facts and concluded that "[t]here is insufficient evidence of a causal [sic] relationship between plaintiff's employment and his chronic obstructive lung disease to support an award in this case." The Full Commission affirmed and adopted the deputy commissioner's findings and conclusion, with Commissioner Coy M. Vance filing a dissenting opinion. Plaintiff appeals from the Full Commission's Opinion and Award.

*Michael E. Mauney for plaintiff-appellant.*

*Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for defendant-appellee.*

HILL, Judge.

The deputy commissioner made the following findings of fact:

1. Plaintiff was born on October 16, 1921 and finished the seventh grade in school. He went to work for Fieldcrest Mills in 1952. When plaintiff first went to work for Fieldcrest Mills he was employed in the weave department where he worked as a weaver and loom cleaner until 1963 and thereafter worked intermittently in both the weave room and inspection department until 1965. From 1965 until the plaintiff retired in 1978 he worked in the inspection area as a cloth checker.

2. During the first years of employment the mill processed cotton material but in the latter years (four or five) before retirement cotton blends and synthetics were processed. In 1975 polyester and rayon were processed. The cloth which would come to the plaintiff for inspection had been washed, dyed, and woven. There was a small amount of dust involved. . . .

3. In the weave room the cotton dust and lint were thick. As a weaver and loom cleaner plaintiff was constantly exposed to cotton dust. The dust would be particularly bad as the looms were being blown off.

4. Plaintiff began experiencing breathing problems consisting of cough and shortness of breath four or five years

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**Lumpkins v. Fieldcrest Mills**

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before his retirement from his employment. He would notice that his breathing problems would improve when he was away from work either on weekends but would return when he returned to work and was again exposed to the dust and lint. Plaintiff was advised by medical doctors to get out of an environment where there was dust present. Plaintiff stopped working in March of 1978.

5. Since leaving the mill plaintiff has worked part-time as a security person.

6. Plaintiff smoked a pack of cigarettes a day for approximately 25 years until 1979. At that time plaintiff stopped smoking for a short while. He now smokes no more than a pack and a half a month.

7. Dr. Herbert O. Sieker, a member of the Commission's Occupational Disease Panel, examined the plaintiff on February 27, 1979 and reported in part as follows:

. . . . .

IMPRESSIONS: 1. Chronic obstructive lung disease.

2. History of hypertensive vascular disease.

The patient has history and findings indicating that he is disabled for work involving strenuous physical activity, but he is capable of engaging in work with moderate degree of activity. In view of the history that symptoms were worse in the last several years with cotton dust exposure, this must be considered as a possible etiologic factor. Patient, however, is clearly not completely disabled, but he should not work in cotton dust in the future."

8. Plaintiff has chronic obstructive lung disease and a history of hypertensive vascular disease.

9. It was Dr. Sieker's impression that the plaintiff was disabled at most for strenuous physical activity in that he could do the same type of work he had been doing for the last four or five years before his retirement but he should work in an environment free of dust, this to include cotton dust. . . .

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**Lumpkins v. Fieldcrest Mills**

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10. Plaintiff should not work in the cotton dust, but there is insufficient history to implicate this as the causative factor in his chronic obstructive lung disease. . . .

11. There is insufficient evidence of a causal [sic] relationship between plaintiff's employment and his chronic obstructive lung disease to support an award in this case.

. . .

As noted above, Deputy Commissioner Delbridge concluded that these facts do not show a sufficient causal relationship between plaintiff's employment and his lung disease to grant him compensation.

Our scope of review in this matter is as follows:

Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding of fact. [Citations omitted.] The appellate court does not retry the facts. It merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact.

*Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E. 2d 458, 463 (1981).

The Workers' Compensation Act contemplates that two events must occur before a workers' compensation claim ripens: (1) injury from an occupational disease, which (2) causes disability. *Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980); *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E. 2d 175 (1981).

Plaintiff's third and fourth arguments attack the deputy commissioner's conclusion, in essence, that he is not suffering from an occupational disease. There are three elements necessary to prove the existence of a compensable occupational disease under G.S. 97-53(13): (1) the disease must be due to conditions which are characteristic of a particular employment, (2) the disease is not an "ordinary disease[s] of life to which the general public is equally exposed outside of the employment," *Id.*, and (3) "proof of a causal connection between the disease and the employment." *Hansel v.*

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*Sherman Textiles*, 304 N.C. 44, 52, 283 S.E. 2d 101, 106 (1981). See *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). In *Morrison v. Burlington Industries*, *supra*, at 12-13, 282 S.E. 2d at 467, our Supreme Court interpreted the latter element to be

the extent of the disablement *resulting from* said occupational disease, *i.e.*, whether she is totally or partially disabled *as a result of the disease*. If the disablement resulting from the occupational disease is total, the claimant is entitled to compensation as provided in G.S. 97-29 for total disability. If the disablement resulting from the occupational disease is partial, the claimant is entitled to compensation as provided in G.S. 97-30 for partial disability. . . . That means, in occupational disease cases, that disablement of an employee resulting from an occupational disease which arises out of and in the course of the employment, G.S. 97-52 and G.S. 97-2(6), is compensable and claimant has the burden of proof "to show not only . . . disability, but also its degree." *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E. 2d 857, 861 (1965).

(Emphasis original.) The court further discussed the rule of causation in *Hansel v. Sherman Textiles*, *supra*, at 52-53, 283 S.E. 2d at 106:

In workers' compensation actions the rule of causation is that where the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable.

[If the employee] by reason of constitutional infirmities [sic] is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury.

*Vause v. Equipment Co.*, 233 N.C. 88, 92, 63 S.E. 2d 173, 176 (1951).

It has on occasion been implied that a similar rule of causation should prevail in cases where compensation for oc-

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cupational disease is sought; however, if a disease is produced by some extrinsic or independent agency, it may not be imputed to the occupation or the employment. *Duncan v. Charlotte*, 234 N.C. 86, 66 S.E. 2d 22 (1951); *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159, 162 (1980).

However, "[a] mere possibility of causation is neither 'substantial' nor sufficient. It must be shown that the disease in question is an occupational disease; i.e., a disease which is due to causes and conditions which are characteristic of and peculiar to claimant's trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment." *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822, 828 (1982) (emphasis added). See G.S. 97-53(13). Thus, the following rules now apply:

(1) an employer takes the employee as he finds [him] with all [his] pre-existing infirmities and weaknesses. (2) When a pre-existing, *nondisabling*, *non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. (3) On the other hand, when a pre-existing, *nondisabling*, *non-job-related* disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable. (4) When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

*Morrison v. Burlington Industries*, *supra*, at 18, 282 S.E. 2d at 470 (emphasis original). Since the determination of whether there is a causal connection between the disease and the employment is a mixed question of law and fact, we may review the record *sub*

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*judice* to determine if the findings and conclusion are supported by sufficient evidence. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

Finding of Fact Nos. 10 and 11 are critical to the issue of causation. In Finding of Fact No. 10, the deputy commissioner found that "there is insufficient history to implicate this [cotton dust exposure] as the causative factor in his chronic obstructive lung disease." Although we read *Morrison* and *Hansel* merely to require evidence that plaintiff's employment is a *causative factor* in his lung disease, we find evidence to support the deputy commissioner's finding that plaintiff's lung disease has an insufficient causal relationship with his employment to grant him compensation.

Dr. Herber O. Sieker testified as follows:

The cotton dust would implicate that—would be implicated as an aggravating factor and would make me recommend that he is [sic] not work in the cotton dust, but it was my impression that he was disabled at most only for strenuous physical activity.

. . . .

Well, historically he said he had symptoms when he was exposed to the cotton dust in the last four to five years before he stopped working. I don't think from the standpoint of evaluating history one can argue with that and certainly in the future the man should not work in the cotton dust but I don't think that this is the sufficient history to implicate this is [sic] the causative factor in his obstructive lung disease.

. . . .

. . . As I stated in my impression, the cotton dust has to be considered an etiologic fact in causing his symptoms and certainly seeing him as a physician I would recommend that he not work in the cotton dust in the future.

. . . .

From the history I can implicate [plaintiff's employment] as a possible etiologic factor but I cannot strongly say it was the causative or only causative factor.

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Dr. Sieker's medical report indicated the presence of chronic obstructive lung disease and a history of hypertensive vascular disease. Further, "[i]n view of the history that symptoms were worse in the last several years with cotton dust exposure, this must be considered as a possible etiologic factor. Patient, however, is clearly not completely disabled, but he should not work in cotton dust in the future."

"In making its findings, the Commission's function is 'to weigh and evaluate the entire evidence and determine as best it can where the truth lies.'" *Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E. 2d 830, 835, *disc. rev. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980) (emphasis original). The Industrial Commission is the sole judge of the witnesses' credibility and may choose to believe all, a part, or none of any witnesses' testimony. *Id.*; *Morgan v. Thomasville Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968).

Since there is evidence that plaintiff's employment was merely a "possible etiologic factor" in causing his lung disease, we find that the Commission appropriately exercised its function as described above. Our scope of review in this matter therefore mandates that the finding of insufficient causation is conclusive on appeal, and that the opinion and award be affirmed. Unless there is a proper finding that plaintiff suffers from an occupational disease, the analysis required by *Morrison* and *Hansel* is inappropriate. See *Walston v. Burlington Industries, supra*; see also *Rutledge v. Tultex Corp.*, 56 N.C. App. 345, 289 S.E. 2d 72 (1982).

In light of our disposition of the above arguments, we do not find it necessary to address plaintiff's remaining assignments of error.

Affirmed.

Judge BECTON concurs.

Judge HEDRICK concurs in the result.



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CON CO, INC. v. WILSON ACRES APARTMENTS, LTD., MCGOWAN BUILDERS, INC., KENNEDY MORTGAGE COMPANY, FORD MCGOWAN, SR., AND FORD MCGOWAN, JR.

No. 813SC385

(Filed 6 April 1982)

**1. Laborers' and Materialmen's Liens § 3— subcontractor's lien by subrogation— defenses available against contractor**

Plaintiff subcontractor could not perfect a lien by subrogation under G.S. 44A-23 where the prime contractor had made an agreement with the landowner that it would not perfect a lien against the real property of the landowner.

**2. Laborers' and Materialmen's Liens § 3.2— claim of lien—notice to owner**

The fact that plaintiff first tier subcontractor did not give actual notice to the owner of a claim against the prime contractor until after it filed a claim of lien in the office of the clerk of superior court did not void the claim of lien filed in the clerk's office. G.S. 44A-20 and G.S. 44A-18.

**3. Laborers' and Materialmen's Liens § 3— mortgage lender not owner—no liability to subcontractor**

Defendant mortgage lender was not a person "for whom an improvement was made" or "who ordered the improvement to be made" so as to be an "owner" within the meaning of G.S. 44A-7(3) and thus an "obligor" under G.S. 44A-17; nor did defendant lender have a power coupled with an interest so as to be an agent of the owner within the meaning of G.S. 44A-7(3). Therefore, defendant lender did not become obligated to plaintiff first tier subcontractor when it advanced money to the owner after being notified of plaintiff's claim of lien against the prime contractor and the amount advanced was paid to the prime contractor.

APPEAL by plaintiff from *Rouse, Judge*. Judgments entered 23 December 1980 and 16 February 1981 in Superior Court, PITT County. Heard in the Court of Appeals 19 November 1981.

This is an action to enforce liens. The plaintiff, Con Co, Inc., is a corporation which engages in the construction business. The defendant McGowan Builders, Inc. is a corporation which contracted to build an apartment complex for Wilson Acres Apartments, Ltd., a limited partnership organized under the law of North Carolina. Kennedy Mortgage Company is a mortgage lender which financed the project. Ford McGowan and Ford McGowan, Jr. are the principal stockholders in McGowan Builders, Inc. and general partners in Wilson Acres Apartments, Ltd.

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On 27 November 1979 the plaintiff filed against property owned by Wilson Acres Apartments, Ltd. in Pitt County notice of a claim of lien by a contractor and a claim of lien by a first tier subcontractor. It then filed actions to enforce the liens.

Wilson Acres Apartments, Ltd. and Kennedy Mortgage Company made motions for summary judgment. The pleadings and papers filed in regard to the motions for summary judgment show the following facts are not in dispute. McGowan Builders, Inc. is a general contractor which contracted with Wilson Acres Apartments, Ltd. to build an apartment complex on land in Pitt County owned by Wilson Acres. On 5 February 1979 the plaintiff entered into a contract with McGowan Builders, Inc. to do certain work on the project. Plaintiff performed its last work on the project on 31 August 1979. After the plaintiff had filed its notices of claims of liens, Wilson Acres Apartments, Ltd. first received actual notice of the claims when it was served with copies of the summons and complaint on 30 December 1979. Kennedy Mortgage Company first received actual notice of the claims when it was served with copies of the summons and complaint on 11 February 1980. The construction contract between McGowan Builders, Inc. and Wilson Acres Apartments, Ltd. contained a provision that McGowan would not file a lien or claim against the real estate owned by Wilson Acres.

Kennedy Mortgage Company was the construction lender for the project. After it was served with a copy of the complaint, Kennedy disbursed to Wilson Acres a sufficient sum of money to pay the claim of plaintiff which sum was paid by Wilson Acres to McGowan Builders, Inc. In its complaint the plaintiff alleged it had entered into an agreement with McGowan Builders, Inc. on 11 July 1979 providing that Ellis Morall, Inc. would complete the work of the plaintiff but McGowan Builders, Inc. had breached this contract by refusing to let Ellis Morall, Inc. complete the work. For that reason the plaintiff alleged it elected to treat the contract to let Ellis Morall, Inc. complete the work as rescinded and treat the contract of 5 February 1979 as still in full force and effect.

The court granted the motions for summary judgment by Wilson Acres Apartments, Ltd. and by Kennedy Mortgage Company. The judge found that each summary judgment was a final

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judgment as to the party for whom it was allowed and there was no just reason for delay.

*Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith, for plaintiff appellant.*

*Everett and Cheatham, by Edward J. Harper, II and C. W. Everett, Sr., for defendant appellees Wilson Acres, Ltd., McGowan Builders, Inc., Ford McGowan, Sr. and Ford McGowan, Jr.*

*No counsel for Kennedy Mortgage Company.*

WEBB, Judge.

At the outset we note that this action involves multiple parties. Judge Rouse found there was no just reason for delay as to both summary judgments. The judgments are appealable pursuant to G.S. 1A-1, Rule 54(b). *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

[1] The facts which are not in dispute show that the plaintiff was a first tier subcontractor on the Wilson Acres apartment project. Article 2, Part 2 of Chapter 44A of the General Statutes provides for the perfecting of liens by subcontractors. A lien in favor of a subcontractor may arise either directly under G.S. 44A-18 and G.S. 44A-20 or by subrogation under G.S. 44A-23. If a subcontractor attempts to perfect a lien by subrogation, he is bound by any defenses available against the contractor. *See Mace v. Construction Corp.*, 48 N.C. App. 297, 269 S.E. 2d 191 (1980). In this case the contractor made an agreement with the landowner that it would not perfect a lien against the real estate. The plaintiff is bound by this agreement. It cannot perfect a lien by subrogation. Summary judgment was properly allowed as to the plaintiff's claim for a contractor's lien.

The waiver of the right to establish a lien by the prime contractor does not affect plaintiff's right to perfect a lien as a subcontractor under G.S. 44A-18 which provides:

"Upon compliance with this Article:

- (1) A first tier subcontractor who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the con-

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tractor with whom the first tier subcontractor dealt and which arise out of the improvement on which the first tier subcontractor worked or furnished materials.

\* \* \*

- (6) The liens granted under this section are perfected upon the giving of notice in writing to the obligor as hereinafter provided and shall be effective upon the receipt thereof by such obligor."

G.S. 44A-20 provides:

"(a) Upon receipt of the notice provided for in this Article the obligor shall be under a duty to retain any funds subject to the lien or liens under this Article up to the total amount of such liens as to which notice has been received.

(b) If, after the receipt of the notice to the obligor, the obligor shall make further payments to a contractor or subcontractor against whose interest the lien or liens are claimed, the lien shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice was received prior to payment.

\* \* \*

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a lien upon the interest of the obligor in the real property to the extent of the owner's personal liability under subsection (b), which lien shall be enforced only in the manner set forth in G.S. 44A-7 through 44A-16 and which lien shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor."

Under this statute when a subcontractor notifies the owner of a claim against the contractor and the owner disburses money to the contractor after such notification, the owner is liable to the subcontractor to the extent of the funds disbursed and the subcontractor may perfect a lien on the realty of the owner. In the

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instant case the papers show that the plaintiff notified the owner of a claim against the contractor prior to payment by the owner to the contractor. This would create a debt from Wilson Acres Apartments to Con Co, Inc. and if properly perfected, would create a lien on the land of Wilson Acres Apartments in favor of the plaintiff.

[2] Wilson Acres Apartments, Ltd. argues that the notice was not properly given under G.S. 44A-20 because the plaintiff filed the lien claim before giving actual notice to the obligors. It contends the lien could not have arisen until notice was given and by filing the lien claim before notice was given, it is of no effect. We cannot so hold. We do not believe the fact that the lien claim was filed before the notice was actually served should make a difference. The claim did not ripen into a lien upon the land until Wilson Acres paid McGowan Builders after being notified of the claim. The plaintiff had to file the claim for the lien within 120 days of the last work performed in order to comply with the statute in perfecting the lien. We hold that the fact that the plaintiff did not give actual notice of the claim until after it had filed the claim in the office of the clerk of superior court did not void the claim of lien which was filed in the clerk's office. If Wilson Acres had moved to strike the claim before paying McGowan Builders, it might be a different case.

The appellees also contend that the plaintiff may not bring this action because it is not the real party in interest. They say this is so because by its own allegations in the complaint, the plaintiff shows that Ellis Morall, Inc. had contracted to complete the work for plaintiff and Ellis Morall, Inc. should be the party who brings this action. The plaintiff has also alleged that McGowan Builders, Inc. breached the contract by refusing to allow Ellis Morall, Inc. to complete the work. Plaintiff alleged that because of the material breach by McGowan of the Ellis Morall, Inc. contract, the plaintiff had elected to treat the contract as rescinded. If the plaintiff can prove these allegations, it is the proper party to bring this action.

We hold the superior court was in error in granting the motion for summary judgment for Wilson Acres Apartments as to the plaintiff's claim for a debt against Wilson Acres Apartments and for its claim of lien as a first tier subcontractor on the real property of Wilson Acres Apartments.

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[3] As to the claim against Kennedy Mortgage Company, we hold the defendant's motion for summary judgment was properly allowed. Kennedy Mortgage Company financed the construction of the property. Plaintiff argues that Kennedy Mortgage Company is an obligor within the meaning of G.S. 44A-18(6) and G.S. 44A-20 so that when it advanced money to Wilson Acres Apartments after being notified of the plaintiff's claim, it became obligated to the plaintiff for its claim. G.S. 44A-17 provides:

"Unless the context otherwise requires in this Article:

\* \* \*

- (3) 'Obligor' means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property."

G.S. 44A-7 provides:

"Unless the context otherwise requires in this Article:

\* \* \*

- (3) An 'owner' is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. 'Owner' includes successors in interest of the owner and agents of the owner acting within their authority."

The plaintiff contends Kennedy Mortgage Company is an owner within the meaning of G.S. 44A-7(3) which makes it an obligor within the meaning of G.S. 44A-17(3). Kennedy Mortgage would have an interest in the real property since it has a deed of trust upon it. We do not believe, however, that it is a person "for whom an improvement was made" or "who ordered the improvement to be made." The fact that its secured interest was improved by the improvements does not mean the improvement was made for it. The improvement was made for Wilson Acres Apartments, Ltd. Wilson Acres, not Kennedy, ordered the improvements to be made. The plaintiff contends that the provisions of the deed of trust which gives Kennedy Mortgage Company such rights as the right to pay taxes, collect on insurance policies, approve construction, and disburse funds gives the mortgagee a power coupled

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with an interest which is a form of agency. We do not believe the legislative intent is that Kennedy Mortgage Company is an agent within the meaning of this statute. We hold that the plain words of G.S. 44A-7(3) require we determine Kennedy Mortgage Company is not an agent of the owner.

As to the summary judgment in favor of Wilson Acres Apartments, Ltd. we affirm as to the claim for a contractor's lien and reverse and remand for further proceedings in accordance with this opinion as to the claim for a debt against Wilson Acres Apartments, Ltd. and for a lien as a first tier subcontractor against the real property.

Affirmed in part; reversed and remanded in part.

Judges VAUGHN and HILL concur.

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STATE OF NORTH CAROLINA v. JANEY KAREN GRAY

No. 8123SC949

(Filed 6 April 1982)

**1. Criminal Law § 73— statements by witness—not inadmissible hearsay**

The trial court did not err in allowing an agent to testify as to conversations and acts he had with a co-conspirator of defendant where two of the statements involved the agent's restatement of what he had said during a drug transaction, another statement was the agent's description of what occurred, not what was said, during the drug sale, and two statements were of what defendant told the agent.

**2. Criminal Law § 73— testimony as to how agent learned of drug deal—admissible**

Testimony as to how an agent learned that he would receive seven pills of methaqualone for \$18 and testimony as to what the agent actually paid defendant was properly admissible as the agent's testimony that a co-conspirator of defendant informed him of the specifics of the deal was not offered to prove the truth of the matter asserted by the co-conspirator and was, therefore, not objectionable as hearsay.

**3. Criminal Law § 33— questions concerning other undercover operations conducted by agent—not prejudicial**

Defendant failed to show prejudice in the admission into evidence of other undercover operations conducted by an agent during and immediately after a

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drug transaction with the defendant since on cross-examination, defense counsel was free to attack the agent's expertise and to destroy any implications that the defendant was involved, or was a suspect, in any of the agent's other investigations.

**4. Narcotics § 4.7— instructions as to lesser offenses—no error**

The trial court did not err in submitting the offense of possession of methaqualone as a lesser included offense of possession of methaqualone with intent to sell or deliver.

**5. Conspiracy § 6; Narcotics § 4— conspiracy to sell or deliver methaqualone—sufficiency of evidence**

The evidence of conspiracy to sell or deliver methaqualone was sufficient for submission to the jury where the evidence tended to show that the alleged co-conspirator took an agent to defendant's residence; that the co-conspirator met with defendant inside the house and then returned to the agent to communicate the specifics of the deal; that the co-conspirator handled the money in the transaction; and that the co-conspirator, the agent and the defendant consummated the deal in defendant's house. G.S. 15A-1227(d) permitted review of the sufficiency of the evidence despite defendant's failure to interpose motions for dismissal or directed verdict at the close of the State's evidence and again at the close of all the evidence.

**6. Narcotics § 5— judgment not conforming with verdict—error**

The trial court committed prejudicial error in entering judgment for a felony, possession with intent to sell or deliver methaqualone, instead of a misdemeanor, simple possession of methaqualone, where defendant was convicted of the misdemeanor.

APPEAL by defendant from *Long, Judge*. Judgments entered 10 April 1981, in Superior Court, WILKES County. Heard in the Court of Appeals 10 February 1982.

Defendant was charged in separate indictments with three felonies: possession with intent to sell and deliver a Schedule II controlled substance, methaqualone; sale and delivery of methaqualone; and conspiracy with Thomas Gwyn [sic] to sell and deliver methaqualone. At her trial, the State presented evidence tending to show that, on 21 January 1980, Bruce Black, a special undercover agent of the State Bureau of Investigation, called Thomas Quinn to inquire about the purchase of some methaqualone. By arrangement the two men met and proceeded to the home of Richard Clyde Gray. There Agent Black gave Quinn \$18 with which to purchase methaqualone. The agent was able to follow Quinn into the house where he met the defendant and observed her producing a pill bottle with seven white tablets which she gave to Black. Quinn paid Black's \$18 to the defendant,



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and the two men left. An expert in the field of forensic chemistry testified that his analysis of one of the pills showed that it was a Schedule II controlled substance, methaqualone.

The defendant offered no evidence. The jury found defendant guilty of possession of methaqualone, sale and delivery of methaqualone, and conspiracy to sell and deliver methaqualone. From judgment imposing active prison terms, defendant appealed.

*Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.*

*Vannoy, Moore & Colvard, by J. Gary Vannoy, for defendant appellant.*

ARNOLD, Judge.

[1] By her first assignment of error, defendant contends that the trial court erred in allowing Agent Black to testify as to conversations and acts he had with co-conspirator Thomas Quinn. The basis of defendant's contention is that the acts and conversations amounted to inadmissible hearsay. Defendant's assignment of error encompasses six exceptions, two of which involve Black's restatement of what he said during the drug transaction and do not, therefore, fall within the definition of hearsay. Another one of Black's statements to which defendant took exception was his description of what occurred, not what was said, during the drug sale, and we do not find defendant's hearsay argument applicable. Additionally, Agent Black was allowed, on two occasions to which defendant took exception, to testify about what the defendant said to him. The admission of this testimony did not constitute error. "Any statement made by an accused which is relevant to the issue and not subject to some specific exclusionary rule may be received in evidence against him. This is so even when the statements may have been made at a time when they were not against his interest." *State v. Cobb*, 295 N.C. 1, 14, 243 S.E. 2d 759, 766-67 (1978).

[2] Under this assignment of error, defendant brings forward one final exception which she took to the trial court's admission of Black's testimony about how he learned that he would receive seven pills for his \$18. Black's testimony that Quinn informed him of the specifics of the deal, however, was not offered to prove the

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truth of the matter asserted by Quinn and was, therefore, not objectionable as hearsay. 1 Stansbury's North Carolina Evidence § 141 (Brandis Rev. 1973). Defendant's first assignment of error is overruled.

In a later, related assignment of error, defendant contends that the trial court erred in allowing hearsay as to what Black paid defendant. Again we rule that the evidence that Quinn informed Black of the terms of the drug deal did not constitute objectionable hearsay because it was not offered to prove the truth of the matter asserted by Quinn. *Id.* We have also determined at this point that, because we have overruled defendant's assignments of error with respect to this evidence, her fourth assignment of error in which she challenges the trial court's summary of the same evidence has no merit.

[3] Defendant next assigns as error the admission into evidence of other undercover operations conducted by Agent Black during and immediately after the drug transaction with the defendant. Defendant's argument is that such testimony was irrelevant, that it added unfairly to the jury's perception of Black's expertise, and that it allowed the jury to speculate too freely on possible links between the defendant and the other investigations. Assuming *arguendo* that the testimony was irrelevant, this Court can find no resulting prejudice to the defendant. On cross-examination, defense counsel was free to attack Black's expertise and to destroy any implications that the defendant was involved, or was a suspect, in any of Black's other investigations.

[4] By her fifth assignment of error, defendant argues that the trial court erred in charging the jury that possession of methaqualone is a lesser included offense of possession with intent to sell or deliver methaqualone. Defendant's argument has no merit.

Under the general rule in North Carolina, simple possession of contraband is a lesser included offense of possession with intent to sell or deliver the same substance, *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974). The reason for this is that generally the offense of possession does not require proof of an element which is not also required for the offense of possession with intent to sell or deliver. *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979). "One crime is not a lesser included offense of another '[i]f each of two criminal offenses, as a matter of law, re-

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quires proof of some fact, proof of which fact is not required for conviction of the other offense.' " *Id.* at 568, 251 S.E. 2d at 619, quoting *State v. Overman*, 269 N.C. 453, 465, 153 S.E. 2d 44, 54 (1967).

Defendant here relies heavily on the *McGill* case where the Supreme Court held that possession of more than one ounce of marijuana is not a lesser included offense of possession with intent to sell or deliver marijuana. The Court observed that proof of possession of more than one ounce of marijuana required the State to show possession and an amount of marijuana greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and intent by the accused to sell or deliver it. Hence, the two crimes each contain one element that is not necessary for proof of the other crime, and one is not, therefore, a lesser included offense of the other.

In the case at bar, defendant was charged with possession with intent to sell or deliver methaqualone, and the trial court instructed the jury on that charge as well as on simple possession. Unlike the marijuana charges contained in the *McGill* case, the quantity of methaqualone for the offenses of felonious possession and felonious possession with intent to sell or deliver is immaterial. To prove the offense of possession of methaqualone requires only proof of possession; to prove the offense of possession of methaqualone with intent to sell or deliver requires proof of possession as well as the intent to sell or deliver. Possession is, therefore, a lesser included offense of possession with intent to sell or deliver and the trial court's charge was proper.

[5] Defendant contends that the trial court erred in submitting to the jury the charge of conspiracy to sell or deliver methaqualone. The basis of defendant's contention is that the evidence was insufficient as a matter of law to establish conspiracy. Under G.S. 15A-1227(d), "[t]he sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial." We will, therefore, review the sufficiency of the evidence in this case to sustain the verdict in the conspiracy charge despite the defendant's failure to interpose motions for dismissal or directed verdict at the close of State's evidence and again at the close of all the evidence.

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A motion to dismiss in a criminal case requires consideration of all the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). Only evidence favorable to the State is considered, and contradictions and discrepancies in the evidence are for the jury. *Id.*

In order to prove a criminal conspiracy, the State must show an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way. *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975). In the case *sub judice*, the State, in order to prove conspiracy to sell or deliver methaqualone, had to prove an agreement between Quinn and defendant to sell or deliver methaqualone. After reviewing the evidence in the light most favorable to the State, we conclude that the evidence of conspiracy was sufficient for submission to the jury. The State submitted evidence tending to show that the alleged co-conspirator Quinn took Black to defendant's residence; that Quinn met with defendant inside the house and then returned to Black to communicate the specifics of the deal; that Quinn handled the money in the transaction; and that Quinn, Black and the defendant consummated the deal in defendant's house. This was clearly sufficient evidence that defendant and Quinn were working in tandem in selling the methaqualone. *Cf. State v. Jones*, 47 N.C. App. 554, 268 S.E. 2d 6 (1980) (where defendant drove undercover agents to a house, met and conversed briefly with another person, and received from that person a package of heroin which he then sold to the agents).

[6] Finally we consider defendant's argument that the trial court erred in signing the judgment in Case No. 80CRS7099. The record shows that the judgment was for possession with intent to sell and deliver methaqualone but that defendant's conviction was for simple possession of methaqualone. Possession of seven tablets of methaqualone is a misdemeanor, G.S. 90-95(d)(2), while possession with intent to sell or deliver methaqualone is a felony, G.S. 90-95(b)(1). Although the term of imprisonment imposed upon defendant in the erroneous judgment was within the statutory range for simple possession, we find that the trial court committed prejudicial error in entering the judgment as for a felony in-

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stead of a misdemeanor. We, therefore, must vacate the judgment and remand the case for entry of a proper judgment.

Defendant's final assignment of error was contingent upon success in her evidentiary arguments which we have rejected. It is, therefore, without merit.

In summary, in Case No. 80CRS7100 and Case No. 80CRS7101, no error.

In Case No. 80CRS7099, vacated and remanded for entry of judgment consistent with this opinion.

Judges CLARK and WHICHARD concur.

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SUPERSCOPE, INC. AND MARANTZ PIANO COMPANY, INC. v. DENNIS  
KINCAID

No. 8125SC619

(Filed 6 April 1982)

**Mortgages and Deeds of Trust § 19.6— injunction to enjoin foreclosure proceeding  
— withholding payments on note due to breach of employment agreement—denial of injunctive relief improper**

In an action in which plaintiffs alleged that defendant, who had sold his interest in a piano company to plaintiffs in exchange for a note and deed of trust in the amount of \$2,979,042 and who was hired by plaintiff under a three-year employment contract as president of the piano company, had violated his employment contract and breached the fiduciary duties owed plaintiffs, the trial court erred in denying plaintiffs' motion for a preliminary injunction to enjoin foreclosure proceedings instituted by defendant until resolution of the action against defendant. Plaintiffs' evidence indicated a likelihood that they would be able to establish that they were entitled to withhold payments on the note to defendant since defendant breached his employment agreement, and injunctive relief was necessary to protect plaintiffs' rights pending resolution of the original litigation.

APPEAL by plaintiffs from *Ferrell, Judge*. Order entered 27 February 1981 in Superior Court, BURKE County. Heard in the Court of Appeals 10 February 1982.

In its complaint plaintiff Superscope alleged that in July 1978, pursuant to a stock purchase agreement, it had purchased

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all of the outstanding stock of Marantz Piano Company (formerly Grand Piano Company) from defendant and members of his family. Superscope gave defendant, as the shareholders' agent, a note and deed of trust in the amount of \$2,979,042 for the balance due on the sales price of the stock. A security agreement gave defendant a security interest in all personal property of Marantz. Defendant was hired by Superscope under a three-year employment contract as President and Chief Operating Officer of Marantz.

Plaintiffs alleged that defendant had violated his employment contract and breached the fiduciary duties owed plaintiffs. They prayed for \$62,000 in damages and asked that the total amount of damages be trebled for defendant's unfair trade practices.

In his answer defendant denied all material allegations in the complaint. In his counterclaim he alleged breach of the employment contract by Superscope, Superscope's failure to pay defendant for stock pursuant to the terms of the note, and abuse of process.

After plaintiffs had instituted this action against defendant, defendant began a foreclosure proceeding against Marantz, alleging default on the note and deed of trust. Plaintiffs moved for a temporary restraining order and preliminary injunction to enjoin the foreclosure proceeding on the grounds of immediate and irreparable harm. In support of their motion plaintiffs presented the affidavit and testimony at the hearing of Anthony Blazina, Vice-President of Superscope and Executive Vice-President of Marantz. Blazina described the details of defendant's misappropriation of funds, mismanagement of the company and other actions constituting breach of his employment contract and of his fiduciary duties. He stated that Marantz withheld payment on the note to defendant for damages caused by defendant and that Marantz had paid all the other shareholders their pro-rata share under the stock purchase agreement (except for defendant's brother, Joseph Kincaid, against whom an additional claim is pending).

Defendant submitted his affidavit in opposition to the motion in which he averred that plaintiffs were experiencing severe financial difficulties and that since the rate of interest (8%) on the note was well below the current rate, he had sustained substantial losses as a result of plaintiffs' failure to pay the indebtedness.

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By order dated 27 February 1981, the court found there was no showing of irreparable injury and denied plaintiffs' motion for preliminary injunction. Plaintiffs appeal. Further action on the foreclosure proceeding has been stayed pending appeal.

*Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by William L. Rikard, Jr., and Elizabeth S. Love for plaintiff appellants.*

*Byrd, Byrd, Ervin, Blanton & Whisnant by John W. Ervin, Jr., for defendant appellee.*

CLARK, Judge.

The sole issue presented to us for review is whether the court erred in denying plaintiffs' motion for a preliminary injunction to enjoin the foreclosure proceedings pending resolution of the action against defendant.

The burden is on plaintiffs to establish their right to a preliminary injunction. In order to justify issuance of a preliminary injunction, plaintiffs must show a likelihood of success on the merits of their case and either that they are likely to sustain irreparable loss unless the injunction is issued or that issuance is necessary for the protection of plaintiff's rights during the course of litigation. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975). Issuance of an injunction is a matter of discretion to be exercised by the trial court, after weighing the equities and the advantages and disadvantages to the parties. Its purpose is to preserve the *status quo* until trial can be had on the merits. *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116 (1953). On appeal from an order granting or denying a preliminary injunction, this Court is not bound by the findings of fact of the trial court, but may review and weigh the evidence and find the facts for itself. *Pruitt v. Williams*, *supra*.

We think that plaintiffs' evidence was sufficient to show the likelihood of success at trial on the merits. Their evidence tends to show the following: that defendant violated company policies concerning reimbursement for business-related travel, entertainment and car expenses; that he retained duplicate checks for his salary that he was mistakenly issued due to clerical error; that he breached his fiduciary duties owed to the company and breached

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his employment contract by not withdrawing as shareholder of firms doing business with plaintiffs and by conducting business with these firms to the profit and advantage of the other firms. The company's profits and goodwill suffered due to his inattention to his managerial duties and responsibilities and by the lack of inventory controls in his operation of the company.

The deed of trust executed by plaintiff Marantz specifically incorporates by reference the terms of the stock purchase agreement. In the stock purchase agreement defendant promised to use his "best efforts" to preserve the business and goodwill of the company. The promissory note also specifically recites that it is subject to the terms of the stock purchase agreement:

"This Promissory Note is issued under and is subject to all of the terms and conditions of the Agreement [stock purchase agreement] and all documents executed and delivered in connection therewith, and is secured by a Security Agreement as described in Article 3.5 of the Agreement and delivered to Payee pursuant to said Agreement.

*The obligations of the undersigned to pay said installments shall be subject to the obligations of the parties as provided in the Agreement.*" (Emphasis added.)

The forecast of plaintiffs' evidence, therefore, indicates a likelihood that they will be able to establish that they were entitled to withhold payments on the note to defendant since defendant breached his employment agreement, his fiduciary duties and the stock purchase agreement.

Turning to the second element which must be proved by plaintiffs, we find that injunctive relief is necessary to protect plaintiffs' rights pending resolution of the original litigation. The note and security deed of trust, which defendant seeks to foreclose, were a part of the transaction involving the sale to plaintiffs of all the outstanding stock of Marantz Piano Company by defendant and others. The transaction included an employment contract in which defendant was hired as President and Chief Operating Officer of the piano manufacturing business. The defendant in his answer and counterclaim, filed 26 September 1980, alleged breach of the employment contract and default on the note secured by the deed of trust. Plaintiffs in their reply denied



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the failure to pay defendant his pro-rata share which he claimed was due on the note. The defendant in January 1981 sought a foreclosure under the power of sale in the deed of trust as provided by Article 2A, Chapter 45, General Statutes of North Carolina. If not protected by issuance of a temporary injunction the plaintiffs would have to pay the sum claimed, though at issue in this litigation, to avoid foreclosure sale of the corporate property described in the deed of trust.

In *Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E. 2d 566 (1977), plaintiffs brought an action to have declared void a default judgment which established a laborer's and materialmen's lien on the property owned by plaintiffs. The trial court refused to grant to plaintiffs a preliminary injunction prohibiting sale of the lands under execution issued on that judgment. The Supreme Court ruled that the trial court erred in denying the preliminary injunction because plaintiffs had sufficiently shown the likelihood of success upon the trial of their case on its merits and that injunctive relief was necessary for the protection of the plaintiffs' property during the course of the litigation in order to avoid the creation of a cloud on title.

Where an injunction is sought to restrain the sale of property upon a deed of trust or other lien, and there is a serious controversy as to default or the amount due, the courts in North Carolina have generally continued the injunction to the final hearing. See *Realty Corp. v. Kalman*, 272 N.C. 201, 159 S.E. 2d 193 (1967); *Smith v. Bank*, 223 N.C. 249, 25 S.E. 2d 859 (1943); *Teeter v. Teeter*, 205 N.C. 438, 171 S.E. 620 (1933); *Wentz v. Land Co.*, 193 N.C. 32, 135 S.E. 480 (1927); *Sanders v. Insurance Co.*, 183 N.C. 66, 110 S.E. 597 (1922); 9 Strong's N.C. Index 3d *Mortgages and Deeds of Trust* § 19.5 (1977).

We concede that the case before us differs from the line of cases cited above in that plaintiffs' claim is unliquidated and based on breach of the management contract rather than the usual controversy over default or the amount paid on the debt, but it is clear in this case that the promissory note, deed of trust, security agreement, and employment agreement, were signed at the same time and related to the same subject matter. Under these circumstances these instruments must be construed together as part of the same transaction. The record on appeal

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reveals a bona fide controversy arising under this transaction, a controversy that should be resolved before there is a foreclosure sale of the corporate property which was the subject of the transaction. The order denying the preliminary injunction is

Reversed.

Judges ARNOLD and WHICHARD concur.

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STATE OF NORTH CAROLINA v. ROLAND NORMAN JARVIS, JR.

No. 8126SC864

(Filed 6 April 1982)

**1. Criminal Law § 87— asking witness similar question—no prejudicial error**

The trial court did not err in allowing the State to ask the prosecuting witness, who was thirteen at the time, whether she had heard a tape recording in the prosecutor's office after the witness had already testified that she had not heard the recording since making it.

**2. Criminal Law § 70—testimony and ruling concerning introduction of recording—proper**

The trial court properly allowed a prosecuting witness in a trial for incest to testify as to a recording's accurate reproduction of events and the recorder's proper functioning. Further, the trial judge properly listened to the recording, allegedly made while the prosecuting witness's adoptive father made advances to her, prior to ruling on its admissibility.

**3. Criminal Law § 34.8— use of recording to show common plan or scheme—instructions proper**

Where a recording concerning a sexual offense, other than the offense for which the defendant was charged, was played for the jury, the court properly instructed that the State was offering the evidence solely for the purpose of showing that there existed in defendant's mind a common scheme, plan or design to commit the crime for which he was charged.

APPEAL by defendant from *Johnson, Judge*. Judgment entered 7 April 1981, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 February 1982.

Defendant was charged by two indictments, proper in form, with the crimes of incest and second degree rape. At trial, the State's evidence tended to show that, on 25 August 1980, defend-

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ant, the adoptive father of the prosecuting twelve-year old witness, forced his daughter to engage in vaginal intercourse. This was not the first time defendant had engaged in sex with the young girl. As early as June 1979, he had begun to fondle her and, in July 1979, had first had intercourse with her. From July 1979 to August 1980, defendant had intercourse with her two or three times a week.

The defendant's evidence tended to show that the prosecuting witness had complained to her mother about the defendant's advances and that the girl's mother and the defendant had taken the girl to a gynecologist for a physical examination. Dr. William Toler, the examining physician, testified that he examined the prosecuting witness in August 1980, and that his examination showed that the girl's hymenal ring was intact. In Dr. Toler's opinion, the child could not have had vaginal intercourse with a normal adult male twenty to forty times without rupturing the hymenal ring. Defendant's evidence further tended to show that his reputation in the community was good.

The State presented rebuttal evidence tending to show that defendant's reputation and character within the community was not good. To rebut Dr. Toler's testimony, Dr. Katherine Johnson, an expert in the field of obstetrics and gynecology, testified that she had examined the prosecuting witness, that the girl's hymenal ring was intact, and that, despite this, in her opinion, the girl could have had vaginal intercourse at least 20 times, depending on the elasticity of the ring.

The jury returned verdicts of guilty to both charges. The trial court sentenced defendant to consecutive prison terms and recommended that defendant be given psychological and physical examinations and any aversion therapy beneficial to the defendant. From this judgment, defendant appealed.

*Attorney General Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the State.*

*Levine, Goodman & Carr, by Michael P. Carr, for defendant-appellant.*

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MORRIS, Chief Judge.

Prior to defendant's trial, defense counsel filed a motion to suppress a tape recording allegedly made by the prosecuting witness while defendant was forcing her to have sexual intercourse with him. The record shows that, in a pretrial hearing, the trial court, Judge Allen presiding, held an extensive *voir dire* hearing to determine admissibility of the recording. At the end of the hearing, the court entered an order allowing the State to admit the recording into evidence and at trial the recording was, in fact, admitted.

[1] In this appeal, six of the seven questions defendant raises are concerned with alleged errors occurring during the *voir dire* hearing, in the court's order, or with the manner in which the recording was presented to the jury. The first argument is that, during the *voir dire*, the court erred in allowing the State to ask the prosecuting witness whether she had heard the tape recording in the prosecutor's office after the witness had already testified that she had not heard the recording since making it. We find nothing wrong with the trial court's allowing this question. It is apparent from the record that the prosecuting witness, who was thirteen years of age at the time of trial, had forgotten that she had listened to the recording in the prosecutor's office. The prosecutor's question simply rephrased his earlier question calling the witness' attention to the circumstances under which she had heard the recording. We find no prejudicial error which, if corrected, might have led to a different result in the hearing and, therefore, in the trial. G.S. 15A-1443(a).

By his next three assignments of error, defendant contends that the court erred (1) in allowing the prosecuting witness to testify that the recording accurately reproduced everything that happened, (2) in allowing her to testify that the recorder was capable of recording when she made the tape, and (3) by listening to the recording prior to ruling on its admissibility. Further, by his fifth assignment of error, defendant contends that the court erred in admitting the recording because it was not properly authenticated. Although we can find no case squarely on point with the case at bar, we have determined that there is no merit in defendant's argument.

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In *State v. Godwin*, 267 N.C. 216, 147 S.E. 2d 890 (1966), the Supreme Court held that tape recordings of telephone conversations between the defendant and the prosecuting witness were properly authenticated and, therefore, admissible into evidence where the prosecuting witness identified the voices and testified that the recordings were a fair and accurate representation of the conversations she had had with the defendant. In a later case, *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971), the Supreme Court enumerated the steps necessary to lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement made to law enforcement officers. Upon objection to the introduction of the recording, the court must conduct a *voir dire* to determine to its satisfaction (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording and that it was functioning properly at the time of the recording; (3) that the operator was competent and operated the machine properly; (4) that the recorded voices can be identified; (5) that the recording is accurate and authentic; (6) that the defendant's entire statement was recorded and no changes, additions or deletions, have since been made; and (7) that there was a proper custody and manner of preserving the recording since it was made.

The steps for authentication set forth in *Lynch* have been applied also for authenticating recorded statements made between a defendant and one who later becomes a witness for the State. See *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). The Court in *Detter* stated:

Whenever a recorded statement is introduced into evidence the seven steps set forth in *Lynch* should be followed to insure proper authentication of that recording. 29 Am. Jur. 2d Evidence § 436 (1967); Annot., 58 A.L.R. 2d 1024, § 4 (1958) and cases cited therein. It is apparent, from a close reading of both *Godwin* and *Lynch*, that the seven steps enumerated in *Lynch* are but a further breakdown and more precise statement of the requirements for authentication that are subsumed within the second requirement in *Godwin* that the recording be a "fair and accurate representation of the conversations." *State v. Godwin*, *supra* at 218, 147 S.E. 2d at 891.

*Id.* at 628, 260 S.E. 2d at 584. We believe that the requirements for admitting into evidence tape recordings made by witnesses

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after police intervention, should strictly apply to cases such as the present one where tape recordings are made by victims of an alleged crime before the police have intervened. With these requirements before us, we now review defendant's four assignments of error.

[2] Defendant's argument that the trial court should not have allowed the prosecuting witness to testify as to the recording's accurate reproduction of events and the recorder's proper functioning is patently absurd. Under the *Lynch* requirements, the trial court had to determine that the recording was accurate and that the mechanical device was capable of recording. The only person capable of producing evidence on these issues was the prosecuting witness. Furthermore, we reject defendant's argument that the trial judge should not have listened to the recording prior to ruling on its admissibility. In the *Lynch* case, the Supreme Court stated that, upon an objection to the introduction of a recorded statement, the trial judge should not only hold a *voir dire*, but should also listen to the recording in the absence of the jury. "'In this way he can decide whether it is sufficiently audible, intelligible, not obviously fragmented, and, also of considerable importance, whether it contains any improper and prejudicial matter which ought to be deleted.'" *State v. Lynch*, supra at 17, 181 S.E. 2d at 571, quoting *State v. Driver*, 38 N.J. 255, 288, 183 A. 2d 655, 672.

Similarly, after carefully reviewing the record in this case, we reject defendant's claim that the trial court's order admitting the recording into evidence was erroneous within the *Lynch* holding. The order about which defendant complains contained sufficient findings of fact supported by competent evidence that would allow the court to conclude, as it did *seriatim*, that the seven requirements of *Lynch* were met.

[3] Defendant's final argument concerning the tape recording is that the court erroneously instructed the jury about the purpose for which the tape recording was admitted. The record shows that the recording was made on a day other than 25 August 1980, the date of the offense for which the defendant was charged. We, therefore, find no merit in defendant's argument that the trial court erred when it instructed the jury that the State was offering the evidence solely for the purpose of showing that there ex-

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isted in defendant's mind a common scheme, plan or design to commit the crimes for which he was charged.

By his seventh assignment of error, defendant contends that the court erred in admitting into evidence a driver's travel log sheet which allegedly showed where the defendant, a truck driver, was on 24 and 25 August 1980. The basis of defendant's contention is that the prosecutor, who received the sheet two days before trial, failed to comply with a discovery request filed by the defendant. Defendant, however, has failed to include in the record on appeal a copy of his request for discovery or a copy of an order pertaining to discovery. We cannot, therefore, determine whether the State complied with the order or with defendant's request. Nevertheless, in reviewing the record, we find that defendant was given a recess in order to review the log sheet with defendant. This remedy is permissible under G.S. 15A-910(2), and we find, in view of the evidentiary value of the log sheet, that a recess was the appropriate and proper remedy.

In defendant's trial, we find

No error.

Judges VAUGHN and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. JOSEPH DALE ELLERS

No. 815SC925

(Filed 6 April 1982)

**1. Criminal Law § 90.1— showing facts to be other than as testified by witness**

Where the prosecuting witness testified that he purchased a marijuana cigarette from defendant on the Thursday after Halloween, the State was not precluded from showing, through the testimony of other witnesses, that the purchase was actually made on the Thursday before Halloween.

**2. Indictment and Warrant § 17.2; Narcotics § 2— sale of marijuana— variance in date not fatal**

There was no fatal variance between an indictment charging the sale of marijuana on 30 October and testimony by the prosecuting witness that the sale occurred on 5 November where the testimony of other witnesses tended to show that the sale occurred on 30 October; time was not of the essence in

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the offense charged and no statute of limitations was involved; and defendant presented alibi evidence as to the October date.

**3. Narcotics § 4.5— instructions on sale of marijuana**

The trial court's instructions, when considered in their entirety, placed the burden of proof on the State to prove beyond a reasonable doubt that defendant sold the controlled substance marijuana. G.S. 90-87(7).

**4. Narcotics § 5— sale of marijuana to person under 16 years old—increased punishment provisions inapplicable**

A defendant over 18 years of age who was convicted of "selling" marijuana to a minor under 16 years of age was not subject to the increased punishment of G.S. 90-95(e)(5) since that statute applies only to a person convicted of "delivering" a controlled substance to a person 16 years of age or under.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 2 April 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 February 1982.

Defendant was indicted for selling and delivering marijuana to Billy C. Haskins, aged 12 years, on 30 October 1980, defendant being over the age of 18 years at the time, in violation of G.S. 90-95(a)(1) and (e)(5). The jury returned a verdict of guilty of selling marijuana to a minor under 16 years of age, and defendant was sentenced for a minimum term of 17 years and a maximum term of 20 years imprisonment. Defendant appeals.

*Attorney General Rufus L. Edmisten, by Special Deputy Attorney General David S. Crump, for the State.*

*Auley M. Crouch, III, for defendant-appellant.*

WELLS, Judge.

Billy Haskins, aged 12, testified at trial that he first purchased a marijuana cigarette from defendant on the morning of 30 October 1980. Defendant was sitting in a van across the street from the school bus stop at the time. Haskins put the cigarette in his pocket and went to school. The next day he flushed it down the toilet because it had gotten crumpled up in his pocket. On the following Thursday, possibly the 5th of November, Haskins purchased two more marijuana cigarettes from defendant at the same bus stop. He smoked part of one, did not like it, and flushed the other down the toilet. The next day he gave the partially smoked cigarette to a friend, Bryan Godwin, at school.



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Following Haskins' testimony, defendant filed a motion *in limine* to suppress the testimony of other State's witnesses which might tend to impeach Haskins as to the date of his alleged purchase of the marijuana cigarette. Defendant's motion was denied. Thereafter Bryan Godwin testified that he received a partially smoked marijuana cigarette from Haskins on Friday, 31 October. David Taylor testified that he was with Haskins on 30 October when Haskins purchased a marijuana cigarette from defendant at the bus stop. Clifton Long, the principal of the school attended by Haskins and Godwin, testified that at school on 31 October 1980, he took a large, partially smoked marijuana cigarette from Bryan Godwin and subsequently turned it over to the police, who determined that it contained marijuana.

At the close of the State's evidence, defendant renewed his motion *in limine*, which was again denied. Defendant then presented evidence tending to show that he was not at the bus stop on 30 October, did not purchase or possess the van described by Haskins until 2 November, and never sold Haskins any marijuana.

[1] Defendant's first assignment of error is to the denial of his motion *in limine*. He contends that the testimony of Godwin, Taylor, Long, and Officers Benjamin and Norvell directly contradicted Haskins' testimony regarding the date of the alleged sale of the marijuana cigarette, and that the evidence should have been excluded under the rule that a party may not impeach its own witness in a criminal case, and evidence which is new or contradictory is not admissible for purposes of corroboration unless there is only a slight discrepancy in minor details between testimony of the prosecuting witness and testimony offered in corroboration. *State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980); *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973).

The rule that a party may not impeach its own witness does not preclude a defendant or the State from showing a different state of facts on a point through the testimony of other witnesses. "A party may prove that the fact is not as it is stated to be by one of his witnesses; for that is merely shewing (sic) a mistake, to which the best of men are liable." *State v. Tilley*, 239 N.C. 245, 252, 79 S.E. 2d 473, 478 (1953). Haskins testified that he purchased the marijuana cigarette from defendant on the Thursday after

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Halloween. The State was not precluded from showing, through the testimony of other witnesses, that the purchase was actually made on the Thursday before Halloween. *Tilley*, supra. This assignment of error is overruled.

[2] Defendant's second assignment of error is premised on his first. He argues that because the testimony of Billy Haskins was the only competent and admissible evidence for the State, and because that testimony tended to show that the sale took place on 5 November, rather than 30 October 1980 as stated in the indictment, there was a material and fatal variance between the indictment and the evidence which deprived defendant of an opportunity to adequately present his defense. We do not find that the variance between the date of the sale alleged in the indictment and the proof is of such magnitude as to require reversal of defendant's conviction. G.S. 15-155; G.S. 15A-924(a)(4). Time was not of the essence in the offense charged, and no statute of limitations was involved. *See State v. Currie*, 47 N.C. App. 446, 267 S.E. 2d 390 (1980); *cert. denied*, 301 N.C. 237, 283 S.E. 2d 134 (1980). After the State presented its entire case, defendant presented alibi evidence as to 31 October, and denied ever selling marijuana to Haskins. Defendant was neither prejudiced nor deprived of his right to present a defense, *see State v. Oden*, 44 N.C. App. 61, 259 S.E. 2d 795 (1979), *ap. dismissed*, 299 N.C. 333, 265 S.E. 2d 401 (1980); *State v. Locklear*, 33 N.C. App. 647, 236 S.E. 2d 376 (1977), *disc. rev. denied*, 293 N.C. 363, 237 S.E. 2d 851 (1977), and this assignment is overruled.

Defendant next assigns error to the trial court's instructions to the jury. Defendant first contends that the court erroneously failed to point out the discrepancy between the State's evidence and the indictment with regard to the date of the alleged offense. Defendant failed to call this alleged misstatement of the evidence to the court's attention before the jury retired, however, and thus waived his right to assert this as grounds for a new trial. *See State v. Hammonds*, 301 N.C. 713, 272 S.E. 2d 856 (1981); App. R. 10(b).

[3] Defendant also contends that the court failed to charge on the element of delivery as it was required to do in view of defendant's indictment for the sale *and* delivery of marijuana. The trial court charged the jury that to find defendant guilty the State

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must prove beyond a reasonable doubt that defendant knowingly sold marijuana, a controlled substance, to Billy Haskins, that defendant had reached his 18th birthday at the time and that Haskins had not reached his 16th birthday. The court further charged that, "[t]he transfer of a cigarette of marijuana for the receipt of one dollar would be a sale of a controlled substance." These instructions, when considered in their entirety, *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978) placed the burden of proof on the State to prove beyond a reasonable doubt that defendant sold a controlled substance. G.S. 90-87(7); *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). This assignment of error is overruled.

[4] Defendant's final assignment of error concerns his sentence. Defendant was sentenced to 17 to 20 years imprisonment pursuant to G.S. 90-95(e)(5). That statute provides that the punishment for a violation of G.S. 90-95(a)(1), which is normally a maximum of 10 years in prison or a fine of \$10,000 or both, may be increased to a minimum of five years and a maximum of 30 years imprisonment if the person who violates G.S. 90-95(a)(1) is 18 years of age or over and does so by *delivering* a controlled substance to a person 16 years of age or under. The statute makes no provision for increased punishment for one over 18 years of age who is convicted of *selling* marijuana to a minor under 16 years of age, as defendant was. Sale and delivery of controlled substances are two separate, distinct offenses. G.S. 90-95(a)(1); *State v. Dietz*, *supra*. Defendant in this case was charged with both offenses. *Dietz*, *supra*. He was convicted only of selling marijuana. The omission of the offense of *sale* of a controlled substance from the provisions of G.S. 90-95(e)(5) is unaccountable. Criminal statutes must be strictly construed, however, *State v. Lucas*, 302 N.C. 342, 275 S.E. 2d 433 (1981) and therefore, while the result here is regrettable, the judgment must be vacated and the case remanded for resentencing.

No error in the trial;

Vacated and remanded for resentencing.

Judges MARTIN (Robert M.) and WEBB concur.

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**Holcomb v. Hemric**

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BILL HOLCOMB, ADMINISTRATOR OF THE ESTATE OF IDA S. HEMRIC, DECEASED v. HAZEL HEMRIC; CHARLES HEMRIC AND WIFE, MINNIE HEMRIC; KATHLEEN H. WAGONER AND HUSBAND, WILMOTH GRAY WAGONER; JUDY ANN H. GROCE AND HUSBAND, ALVIS GRAY GROCE

No. 8123SC654

(Filed 6 April 1982)

**1. Executors and Administrators § 19— services rendered decedent—award by arbitrators—setting aside for fraud and collusion—counterclaim to petition to sell realty**

An award of arbitrators for personal services rendered to decedent could be set aside upon a showing of fraud or collusion, and respondent heirs could properly raise the issue of the validity of the award by a counterclaim to a petition by the administrator to sell realty to make assets to pay debts of the estate. Furthermore, an issue of fact as to the propriety of the arbitrators' award was raised by the pleadings and should have been decided by a superior court judge rather than by the clerk.

**2. Rules of Civil Procedure § 33— interrogatories to arbitrators**

Interrogatories were improperly served on arbitrators who were not parties to the action. G.S. 1A-1, Rule 33.

APPEAL by respondents from *Lamm, Judge*. Order signed 23 April 1981 in Superior Court, YADKIN County. Heard in the Court of Appeals 2 March 1982.

Prior to her death in 1978, Ida S. Hemric was completely bedridden and required constant and intensive care. Claimants, Hazel Hemric and Jerry Reece, provided that care for the three years preceding her death. By agreement between the administrator of the estate and the claimants, the question of the debt of the estate, if any, for the personal services rendered to the deceased was referred to arbitration. The arbitrators decided in favor of the claimants, awarding \$49,253.00 to Hazel Hemric and \$41,850.90 to Jerry Reece.

Bill Holcomb, the administrator, determined that the estate had insufficient personal property with which to pay the debts and costs of the administration of the estate. Pursuant to article 17 of chapter 28A and article 29A of chapter 1 of the General Statutes of North Carolina, he petitioned the court to authorize the sale of the estate's real property.

The decedent died intestate, leaving surviving her a daughter (the claimant Hazel Hemric) and the lineal descendants of her deceased son, to-wit: Charles Hemric, Kathleen Wagoner, and Judy Groce. In response to the administrator's petition, the

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lineal descendants filed an answer and counterclaim alleging fraud and collusion by and between the administrator, the claimants, and the arbitrators, and asking that the awards be set aside and that a hearing be conducted to determine the validity of any claims against the estate.

The administrator and the claimant Hazel Hemric filed replies to the counterclaim and moved to dismiss the counterclaim. Thereafter, interrogatories to petitioner were served on the administrator, the claimants, and the arbitrators. Hazel Hemric objected to the interrogatories on the ground that she was a named respondent. The arbitrators objected under Rule 33 of the North Carolina Rules of Civil Procedure because they were not parties to the proceeding.

The Clerk of Superior Court of Yadkin County, at a hearing held 19 December 1980, determined that respondents had failed to offer any evidence of fraud or collusion; that the petition to sell the real estate should be granted; that respondents' counterclaim should be dismissed; and that their motion to compel answers to interrogatories should be denied.

The matter was brought before Judge Lamm, who affirmed the order of the clerk as follows:

This Court, after having considered the pleadings herein, the Order entered by The Honorable Harold J. Long, and having heard argument of counsel for both the Petitioner and Respondents, is of the opinion that the Respondents are procedurally in error in filing an Answer and Counterclaim to the Petition for Sale of Realty and that the Order entered by The Honorable Harold J. Long should be affirmed in its entirety. The Court allows the Respondents thirty (30) days from April 22, 1981 to institute a new action.

Claimants, Hazel Hemric and Jerry Reece, appeal that portion of the judge's order allowing respondents thirty days to institute a new action.

Charles and Minnie Hemric, Kathleen and Wilmoth Wagoner, and Judy and Alvis Groce (hereinafter referred to as respondents) appeal the dismissal of their counterclaim and the denial of their motion to compel answers to interrogatories.

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*Everett & Everett, by James A. Everett and Lucy C. Everett, for claimant appellants.*

*Franklin Smith for respondent appellants.*

MARTIN (Harry C.), Judge.

We begin our analysis of this case with a statement of the applicable law as found in the pertinent statutes and cases construing them.

N.C.G.S. 28A-19-15 provides the mechanism by which a disputed claim against a decedent's estate may be referred. The finding of the arbitrators under this section is equivalent to a judgment, but "may be impeached in any proceeding against the personal representative" for fraud or collusion. *See In re Estate of Reynolds*, 221 N.C. 449, 20 S.E. 2d 348 (1942); *Lassiter v. Upchurch*, 107 N.C. 411, 12 S.E. 63 (1890).

Under N.C.G.S. 28A-17-1, the personal representative may "apply to the clerk of superior court of the county where the decedent's real property . . . is situated, by petition, to sell such real property for the payment of debts and other claims against the decedent's estate." Although the proceeding to sell land under this section is a special proceeding before the clerk, if equities are involved over which the superior court acquires jurisdiction, it will determine the whole matter. *See Baker v. Carter*, 127 N.C. 92, 37 S.E. 81 (1900). *See also Wadford v. Davis*, 192 N.C. 484, 135 S.E. 353 (1926) (if pleadings raise an issue of fact, it can be tried by a jury); *McNair v. Cooper*, 174 N.C. 566, 94 S.E. 98 (1917) (upon ample evidence in the record, issue of fraud was submitted to the jury). Moreover, although the heirs are concluded by a judgment previously obtained for the debt and may not plead any defense which could have been, but was not, pleaded by the representative, this rule does not apply where fraud or collusion can be shown. *See Person v. Montgomery*, 120 N.C. 111, 26 S.E. 645 (1897); *Tilley v. Bivins*, 112 N.C. 348, 16 S.E. 759 (1893).

*Person* involved a proceeding to sell and pay the debts and costs of administration. The defendants denied that it was necessary to sell the lands, alleging that the personal estate was sufficient to pay the debts if properly and faithfully administered. The Court held that

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[t]he heirs must be made parties to a proceeding to sell land for assets, and where they deny that it is necessary to sell, or allege that there are sufficient personal assets if properly administered, or that the debts upon which it is asked that the land be sold are not due by the estate, the Court will not order a sale until these questions are determined. . . .

. . . And if fraud and collusion can be shown between the administrator and the creditor, it may be pleaded where there has been judgment.

120 N.C. at 113, 26 S.E. at 646.

[1] Based on the foregoing, we first conclude that the award of the arbitrators in the case sub judice may be set aside upon a showing of fraud or collusion. Respondents properly raised the issue of the validity of the award by counterclaim under N.C.G.S. 28A-17-1. The heirs should be given the opportunity to resist and prevent the land from being applied to the payment of a debt which they allege was wrongfully obtained. Finally, the pleadings raised an issue of fact—the propriety of the arbitrators’ award—and the matter was not one properly before the clerk for determination.

Thus, the trial court erred in both affirming the clerk’s order and in concluding that “respondents are procedurally in error in filing an Answer and Counterclaim to the Petition for Sale of Realty.”

Because we hold that respondents are entitled to be heard before a superior court judge on the issues raised in their counterclaim, we must address their second assignment of error relating to interrogatories submitted to the petitioner, the claimants, and the arbitrators.

[2] N.C.R. Civ. P. 33 states that “[a]ny party may serve upon any other party written interrogatories to be answered by the party served. . . .” Thus interrogatories were improperly served on the arbitrators. They are not parties to this action. We also note that the trial court acts within its discretion in making and refusing discovery orders. *Travel Agency v. Dunn*, 20 N.C. App. 706, 202 S.E. 2d 812, *cert. denied*, 285 N.C. 237 (1974).

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Reversed.

Judges MARTIN (Robert M.) and WHICHARD concur.

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STATE OF NORTH CAROLINA v. FRANK E. POLLOCK, JR.

No. 813SC1037

(Filed 6 April 1982)

**1. Criminal Law § 91.6— denial of continuance—no violation of right to confrontation**

Defendant's constitutional right of confrontation was not violated by the denial of his motion for continuance made on the ground that he was not informed until five days before trial that the State intended to use against defendant the testimony of an alleged co-participant in the crimes charged where defendant made no showing that five days was an unreasonably short time to prepare for the adverse testimony or that additional time would have enabled him to secure specific material evidence with which to counteract the adverse testimony.

**2. Criminal Law § 117.3— witness not testifying under grant of immunity—special "scrutiny" instructions not required**

A witness was not testifying under a "grant of immunity" within the meaning of G.S. 15A-1052(c) where he testified pursuant to an agreement with the State that five of six charges against him would be dropped. Therefore, the trial court was not required to give special instructions concerning the witness's testimony absent a special request by the defendant.

**3. Embezzlement § 5— possession of embezzled property—proof of ownership and embezzlement**

In a prosecution for possession of embezzled meat and conspiracy to possess embezzled meat, the State's evidence was sufficient to show that the meat defendant was charged with possessing was owned by the Craven County Hospital Corporation as charged in the indictment where a witness testified that he had meat in his truck consigned to the hospital, that he took it to defendant's supermarket, and that he put meat which "belonged" to the hospital in the freezer at defendant's supermarket. Furthermore, the State's evidence was sufficient to show that the meat was embezzled where it tended to show that hospital employees were authorized to receive deliveries of meat purchased by the hospital and to sign invoices therefor, that those employees received such meat and signed such invoices, and that the employees diverted certain hospital meat to others for delivery to a supermarket owned by defendant.



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State v. Pollock

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APPEAL by defendant from *Small, Judge*. Judgment entered 2 May 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 3 March 1982.

Defendant was charged in proper bills of indictment with possession of embezzled property and conspiracy to possess embezzled property. A jury found defendant guilty as charged, and from a judgment imposing a prison sentence of not more than four nor less than zero years, defendant appeals.

*Attorney General Rufus L. Edmisten, by Associate Attorney William H. Borden, for the State.*

*Donald D. Pollock, for defendant appellant.*

HEDRICK, Judge.

[1] The first assignment of error brought forth in defendant's brief is "[t]he Court's denial of defendant's Motion to Continue." Defendant argues that he was not informed until five days before trial that the State intended to use against defendant the testimony of an alleged co-participant in a scheme to illegally divert quantities of meat belonging to a hospital, and that the denial of his motion for continuance denied him his constitutional rights to the "production of witnesses, effective assistance of counsel, his right to cross examine State's witnesses and his right to confront his accusers."

Since defendant's motion for continuance is based on a right guaranteed by the Federal and State Constitutions, the decision of the trial judge is reviewable as a question of law. Thus, the question to be answered is: Did the refusal of the trial court to grant the [defendant's] motion for a continuance impinge upon his constitutional right of confrontation, in that it denied him a reasonable time within which to prepare and present his defense?

*State v. Abernathy*, 295 N.C. 147, 159, 244 S.E. 2d 373, 381 (1978). "Continuances should not be granted unless the reasons therefor are fully established," *State v. Rigsbee*, 285 N.C. 708, 711, 208 S.E. 2d 656, 658-59 (1974), and it is desirable that a motion for continuance be supported by an affidavit showing the grounds for continuance. *State v. Rigsbee, supra*. A continuance is proper if

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there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts, but a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial. *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976).

In the present case, defendant had five days in which to prepare a trial strategy for confronting the testimony of the alleged co-participant. Defendant has made no showing that five days was an unreasonably short time to prepare for the adverse testimony. He has not provided an affidavit nor otherwise demonstrated that the additional time afforded by a continuance would have enabled him to secure specific material evidence with which to counteract the adverse testimony. The denial of the motion for continuance did not impinge upon defendant's constitutional rights of confrontation, and this assignment of error is overruled.

[2] By his next assignment of error, defendant argues that the trial court erred in failing to inform the jury prior to the testimony of the alleged co-participant, Charles Koonce, that Koonce was testifying pursuant to an agreement with the State by which five of six charges against him would be dropped; defendant argues also that the trial court erred in not instructing the jury, in its final charge, on interested witnesses. It is defendant's contention that the agreement between Koonce and the State constituted a "grant of immunity" requiring, under G.S. § 15A-1052(c), the court to provide special information and instructions to the jury.

G.S. § 15A-1052(c) provides:

In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses.

The statutory "scrutiny" instruction is required, absent a special request by the defendant, only when a witness testifies under immunity. *State v. Bagby*, 48 N.C. App. 222, 268 S.E. 2d 233 (1980). "[S]uch an instruction is not mandated under an arrangement short of 'immunity' (such as charge reduction . . .)" unless the

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defendant makes a special request therefor. *State v. Bagby, supra* at 224, 268 S.E. 2d at 234. In the present case, defendant made no special request for a "scrutiny" instruction, and Charles Koonce received no grant of immunity but merely had some of the charges against him dismissed. Hence, G.S. § 15A-1052(c) did not apply and the court was not otherwise required to issue special instructions concerning Koonce's testimony. This assignment of error is without merit.

[3] Finally, defendant assigns error to the court's failure to dismiss the charges against him at the close of all the evidence. Defendant argues that there was a fatal variance between the allegations contained in the bills of indictment and the proof offered by the State, in that the State failed to offer proof that the meat defendant was charged with possessing was owned, as charged in the bills of indictment, by the Craven County Hospital Corporation. Defendant contends the State's evidence tended to show only that the meat was owned by another entity. Alternatively, defendant argues that the State presented no evidence that the meat was embezzled, as required by the indictments, but only that the meat was stolen.

"[T]he evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense." *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E. 2d 769, 771 (1968). The purpose of the rule as to variance between indictment and proof is to avoid surprise, in that a discrepancy must not be used to ensnare a defendant or to deprive him of an opportunity to present his defense. *State v. Guffey*, 39 N.C. App. 359, 250 S.E. 2d 96 (1979). A motion to dismiss for insufficiency of the evidence requires the trial court to consider the evidence in the light most favorable to the State, to take it as true, and to give the State the benefit of every reasonable inference to be drawn therefrom; if there is evidence from which a jury could find that the offense charged had been committed by the defendant, the motion must be overruled. *State v. Fletcher*, 301 N.C. 515, 271 S.E. 2d 913 (1980).

In the present case, Charles Koonce testified about diversions he made of "hospital meat." One excerpt of that testimony is as follows:

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I was at the hospital on that date to make a delivery. I did have meat on my truck consigned to the hospital on that occasion. . . . The merchandise that remained on the truck that I delivered somewhere else was supposed to have went [sic] to the hospital.

Q. And where did you take it?

. . .

A. I carried it to Frank Pollock's Supermarket.

. . .

Q. Describe what you did with it when you arrived there.

. . .

A. I backed up to the back door and put the merchandise that *belonged* to the hospital in the freezer and I told them, you know, what I did and, you know, they paid me off at that time. [Emphasis added.]

This testimony alone is sufficient evidence that the Craven County Hospital Corporation owned the meat which defendant was charged with possessing; hence there was no variance between proof and allegations as to who owned the meat.

To present proof conforming to the "embezzled" property allegation in the indictment, the State needed to present evidence that an agent of the hospital, by the terms of his employment, was to receive hospital-owned meat with which defendant was charged with possessing, and that the agent received such meat in the course of his employment and, knowing that it was not his own, converted it to his own use or fraudulently misapplied it. *See State v. Seay*, 44 N.C. App. 301, 260 S.E. 2d 786 (1979), *disc. rev. denied and appeal dismissed*, 299 N.C. 333, 265 S.E. 2d 401, *cert. denied*, 449 U.S. 826, 66 L.Ed. 2d 29, 101 S.Ct. 89 (1980). The State presented evidence tending to show that such hospital employees as Tony Marshall, Morris Simmons, and Thomas Barry were employed to receive deliveries of meat purchased by the hospital and sign invoices therefor, that those employees received such meat and signed such invoices and ordered that certain hospital meat be diverted to Charles Koonce and others to a

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supermarket owned by defendant and that such diversion did occur. Although, as defendant contends, this evidence may show that the meat was "stolen" by Charles Koonce, this evidence also suffices to conform the State's proof to the allegation that the meat which defendant was charged with possessing was embezzled, in that the evidence tends to show a misappropriation of hospital meat by hospital employees. This assignment of error, therefore, has no merit.

We hold defendant had a fair trial free of prejudicial error.

No error.

Chief Judge MORRIS and Judge VAUGHN concur.

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ANNIE MAE HARRELL, EMPLOYEE, PLAINTIFF v. HARRIET AND HENDERSON  
YARNS, EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CAR-  
RIER, DEFENDANTS

No. 8110IC712

(Filed 6 April 1982)

**1. Master and Servant §§ 55.1, 68— workers' compensation—injury from occupational disease—no award for injury to important organ**

Where the Industrial Commission found that plaintiff suffered from "obstructive lung disease" but that her disability was independently caused by non-occupational pulmonary fibrosis, the Commission erred in making an award to plaintiff for "permanent injury to [an] important . . . organ" under G.S. 97-31(24), since that statute applies only to injury by accident and not to an injury caused by an occupational disease.

**2. Master and Servant § 68— workers' compensation—insufficient evidence of disability from occupational disease**

The evidence required the denial of benefits based on disability from an occupational disease under G.S. 97-52 where there was medical evidence that some portion of plaintiff's total lung impairment might be attributable to cotton dust but that plaintiff's lung impairment was caused primarily by non-occupational pulmonary fibrosis; there was insufficient evidence from which the obstructive component of plaintiff's overall condition could be allocated between occupational and non-occupational causes; and there was no evidence that plaintiff would have suffered less than total impairment of earning capacity (i.e. disability) as a result of her non-occupational lung disease alone.

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APPEAL by plaintiff and cross-appeal by defendant from the N.C. Industrial Commission. Opinion and award entered 27 May 1980 and affirmed by the Full Commission 23 February 1981. Heard in the Court of Appeals 9 March 1982.

This action arose when plaintiff sought Workers' Compensation benefits for her chronic lung disease which, she alleged, was an occupational disease compensable under G.S. 97-52. Plaintiff's evidence showed that she had worked for many years in cotton mills, having last worked for defendant Harriet and Henderson Yarns in 1967. Her reason for leaving was unrelated to her health. Plaintiff testified to occurrence of "cold symptoms" prior to leaving defendant's employ, but there was no evidence that she suffered disability or severe breathing problems until several years later.

Medical evidence presented at the hearing clearly showed that plaintiff suffers from chronic lung disease which renders her incapable of physical exertion. She is a middle-aged woman with an eighth grade education and no work experience except as a cotton mill laborer. Plaintiff's incapacity to work at her previous occupation is thus established and there is no evidence of her ability to perform any other work.

Medical evidence overwhelmingly attributed plaintiff's lung impairment primarily to non-occupational "restrictive lung disease." There was some evidence, however, that plaintiff also suffered from "obstructive lung disease" which one doctor thought "could have been contributed to by her cotton dust exposure."

Based on this evidence, the Commission found that plaintiff suffered from an occupational disease, but that her disability was independently caused by non-occupational pulmonary fibrosis. The Commission therefore refused to award disability benefits to plaintiff under G.S. 97-52.

Having concluded, however, that plaintiff suffered from one of the occupational diseases set forth in G.S. 97-53, the Commission held that she was entitled to compensation under G.S. 97-31(24) for "partial loss of lung function."

The Commission awarded plaintiff \$4,000 for "permanent injury to [an] important . . . organ." G.S. 97-31(24). Plaintiff appeals and defendant cross-appeals.

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*Hassell and Hudson, by Robin E. Hudson, for plaintiff appellant.*

*Maupin, Taylor & Ellis, by David V. Brooks and Richard M. Lewis, for defendant appellee/cross appellant.*

ARNOLD, Judge.

I.

[1] Plaintiff first assigns error to the Commission's failure to award plaintiff benefits under the version of G.S. 97-31(24) in effect at the time she became disabled. We agree that, in occupational disease cases, the date of "injury" is deemed to be the date of disability. *See Frady v. Groves Thread*, 56 N.C. App. 61, 286 S.E. 2d 844 (1982). However, as defendant correctly points out in its cross-appeal, injury caused by an occupational disease does not fall within the scope of G.S. 97-31(24).

Until the passage of G.S. 97-52, some six years after adoption of the Workers' Compensation Act, only injury by "accident" was compensable under any provision of the Act. G.S. 97-52 created an exception to the original statutory scheme, allowing recovery for "[d]isablement or death . . . resulting from an occupational disease. . . ." Nothing is said in this provision or cases construing it which could be interpreted as allowing compensation for injury from occupational disease which falls short of "disablement."

We can only conclude that the Commission, in applying G.S. 97-31(24) to the facts of this case, has misconstrued the adoption of G.S. 97-52 as an implied amendment to G.S. 97-2, the general definitional statute. Only by defining "injury" to include impairment due to occupational disease could the Commission award damages under G.S. 97-31, since occurrence of an injury is required to trigger application of the Act. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668 (1949); *Burton v. American National Insurance Co.*, 10 N.C. App. 499, 179 S.E. 2d 7 (1971). Such a definition is in direct conflict with the clear wording of G.S. 97-2(6) which limits "injury," for purposes of the Act generally, to ". . . injury by accident arising out of and in the course of the employment. . . ." Indeed, the statute specifies that injury ". . . shall not include a disease in any form, except where it results . . . from [an] accident." Since G.S. 97-31 contains no language creating

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an exception to this general definition, we hold that it has no applicability to the facts of this case, and that the contrary holding of the Commission must be reversed.

II.

[2] Plaintiff's second assignment of error is that the trial court erred in failing to award her disability benefits pursuant to G.S. 97-52. She notes that the Commission found as fact that Plaintiff has an occupational disease and that "[i]t can be reasonably presumed that the claimant has suffered diminution of her future earning power" as a result of the occupational disease. Taken in isolation, we would agree with plaintiff that these findings justify remand of the cause for further findings apportioning her disability between occupational and non-occupational causes. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). However, the Commission also found as fact that:

10. . . . [Plaintiff] became disabled (from work) as a result of and following contracting non-occupational pulmonary fibrosis. The significant aspect of claimant's current pulmonary disability is as a result of her restrictive lung disease (pulmonary fibrosis) which arose independently of and following her voluntary retirement. . . .

In attempting to resolve the obvious conflict between these findings the Court has carefully reviewed all of the evidence before the Commission and all of its findings. Some of the Commission's findings, *e.g.* that plaintiff was suffering pulmonary impairment at the time of her voluntary retirement, are not supported by the evidence. Others, like those above, are contradictory. It appears to this Court that the Commission adopted these findings for the same reason that the hearing commissioner apparently made them: to characterize the facts in such a way as to attempt to justify at least some compensation for a particularly sympathetic plaintiff, while correctly denying her claim for disability benefits. Indeed, the Commission's humanitarian motives are suggested in its statement that ". . . we are of the opinion that the correct result was reached by the Hearing Commissioner" in spite of its admission that "[c]lose scrutiny of the record is necessary to find that an occupational disease causing any serious problem exists."



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The record reveals only the most carefully qualified medical evidence that some portion of plaintiff's total lung impairment might be attributable to cotton dust. The same doctor dismissed as "speculative" any attempt to assess the relative contribution of obstructive impairment to plaintiff's overall condition and stated that tests "indicate[d] the impairment is restrictive." Moreover, there is insufficient evidence from which the obstructive component, itself a minor or even negligible contributor to plaintiff's condition, could be allocated between occupational and non-occupational causes. Finally, there was no evidence whatsoever that plaintiff would have suffered less than total impairment of earning capacity (*i.e.* disability) as a result of her non-occupational lung disease alone. We hold, therefore, that the evidence overwhelmingly requires denial of benefits based on disability from occupational disease.

While we are not unsympathetic to the Commission's attempt to find an alternative statutory basis for allowing this plaintiff to recover attorneys' fees and a moderate award of benefits, we cannot sanction the misapplication of G.S. 97-31(24). Moreover, to do so would create additional confusing precedent in this area of the law.

Reversed.

Judges CLARK and WEBB concur.

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STATE OF NORTH CAROLINA v. SAMMY RAY RIDDLE

No. 8128SC1039

(Filed 6 April 1982)

**Automobiles § 113.1— involuntary manslaughter—defendant as driver of car—sufficiency of evidence**

In a prosecution for involuntary manslaughter arising out of an automobile accident, the State's evidence was sufficient for the jury to find that defendant was the driver of the car which struck that of decedent where it tended to show that defendant was observed immediately following the collision exiting from the car which collided with decedent's car; no one other than defendant was observed in, at, or near that car at any time; no evidence could be found to support defendant's story that his friend was driving the car and

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ran through the nearby woods after the collision; defendant reached in his pocket and produced the keys to the car when the wrecker driver requested them; defendant told an accident victim and another person at the collision scene that his friend who had been driving owned the car, but he told the investigating patrolman that the car belonged to his girlfriend; defendant told the investigating patrolman that the driver had exited the car from the driver's side, but the patrolman found the door on that side impossible to open because of the damage it had sustained in the collision; defendant indicated that he had known the driver for a long time, but he was unable to describe anything about him except his clothes; and there was evidence tending to show that the alleged driver did not in fact exist.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 3 June 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 4 March 1982.

Defendant appeals from a judgment of imprisonment entered upon a conviction of involuntary manslaughter.

*Attorney General Edmisten, by Associate Attorney G. Criston Windham, for the State.*

*Swain & Stevenson, by Kenneth T. Davies, for defendant appellant.*

WHICHARD, Judge.

The principal issue is whether the court erred in denying defendant's motion to dismiss. We find no error.

The State's evidence tended to show the following:

Donna Wood, while a passenger in a car driven by her husband, Ronald Wood, suddenly saw car lights in the middle of the road and saw her husband turn the steering wheel toward the right shoulder. There was a collision, and the Wood car went into an adjacent field. Ronald Wood died from injuries sustained in the collision.

Donna Wood saw defendant get out of the other car involved in the collision and walk toward her. He told her that his friend owned and was driving the car, and that his friend had jumped out and run through the woods when the collision occurred. She smelled a strong odor of alcohol about him at that time.

Lloyd Messer observed the accident. As he went by the scene he saw a man "standing at the right-hand door on the

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passenger's side" of the car which collided with the Woods car. The man was shutting or opening the door. Messer exited from his vehicle and attempted to assist Mr. Woods. While he was so engaged, defendant approached; and Messer could smell alcohol. Defendant told Messer the car belonged to and had been driven by his friend, and his friend had "run out on him and run through the woods." Messer went to the woods, but could find nothing.

When the investigating patrolman arrived, defendant told him the car belonged to his girl friend. He also told him one Gerald Ray had been driving. He "indicated that Mr. Ray had supposedly left out the driver's door." The patrolman attempted to open that door and was unable to do so because of the damage it had sustained in the collision. The patrolman smelled a strong odor of alcohol about defendant, and observed that defendant was "very hesitant and swaying." In his opinion defendant's faculties were appreciably impaired by some type of alcoholic beverage. Defendant told the patrolman he had consumed four or five drinks of liquor. He told him he had not been driving the car. The only description defendant could give of the alleged driver related to the clothes he wore. The patrolman placed the name Gerald Ray in the PIN machine and found no one in the record by that name.

Another patrolman administered a breathalyzer test to defendant which produced a reading of .14 percent blood alcohol. Defendant also told this patrolman he was not driving the car.

Sheriff's deputies checked the area and could find no evidence "regarding somebody running through the woods." When the wrecker driver requested the keys to the car which collided with the Woods car, defendant "reached in his pocket and got the keys out."

Defendant testified on his own behalf as follows:

He had worked with Gerald Ray seven years previously, but had not seen him in a long time prior to encountering him at a bar the night the collision occurred. Defendant had consumed four or five drinks. He did not know how many Ray had consumed.

Defendant and Ray went to the home of defendant to get the keys to defendant's girl friend's car. Defendant had pled guilty to

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driving under the influence three times in the previous ten year period. His license had been in suspension because of a DUI conviction. Consequently, Ray had driven.

Defendant last saw Ray when the car stopped following the accident. While defendant was at the Woods car, he heard something going through the woods. He looked toward his girl friend's car, did not see Ray coming from there toward the Woods car, and assumed that Ray had run.

Defendant admitted that he had produced the keys to the car when the wrecker came. He stated that he had pulled them out of the car when he went to look for the registration at the request of the investigating patrolman.

In ruling on the motion to dismiss, the foregoing evidence had to be considered in the light most favorable to the State, giving the State the benefit of every reasonable intendment and every reasonable inference to be drawn therefrom. If there was substantial evidence—direct, circumstantial, or both—to support a finding that the offense charged had been committed and that defendant committed it, a case was made for the jury, and the motion was properly denied. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975).

Defendant does not dispute that the evidence sufficiently establishes that the offense charged was committed. He contends, however, that it does not suffice to establish that he committed it.

While the evidence that defendant was the driver of the car which struck that of the decedent was entirely circumstantial, "the identity of the driver of an automobile at the time of a collision may be established by circumstantial evidence, either alone or in combination with direct evidence." *Helms v. Rea*, 282 N.C. 610, 616, 194 S.E. 2d 1, 5-6 (1973). "[C]ircumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment." *Helms* at 616-617, 194 S.E. 2d at 6, quoting from *State v. Alston*, 233 N.C. 341, 344, 64 S.E. 2d 3, 5 (1951).

Viewing the circumstantial evidence here in the light required by the governing principles stated above, we find it sufficient for the jury to pass on in view of the following:

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Defendant was observed immediately following the collision exiting from the car which collided with decedent's car. No one other than defendant was observed in, at, or near that car at any time. Lloyd Messer and the Sheriff's deputies checked the woods area nearby and could find no evidence to support defendant's story that his friend who was driving ran through the woods. Defendant reached in his pocket and produced the keys to the car when the wrecker driver requested them.

Further, there were discrepancies within defendant's statements and between defendant's statements and the physical evidence. Defendant told Ms. Woods and Mr. Messer that his friend who had been driving owned the car, but he told the investigating patrolman the car belonged to his girl friend. He told the investigating patrolman the driver had exited from the driver's side, but the patrolman found the door on that side impossible to open because of the damage it had sustained in the collision. He indicated that he had known the driver for a long time, yet he was unable to describe anything about him except his clothes. Finally, there was no other evidence tending to show that the alleged driver even existed; and there was evidence tending to show that he did not. These discrepancies, together with the evidence set forth above tending to connect defendant and no one else to the death vehicle, were sufficient to render defendant's credibility an issue for the jury.

Defendant relies on *State v. Ray*, 54 N.C. App. 473, 283 S.E. 2d 823 (1981). In *Ray* the evidence failed to establish that the car occupied by defendant "had been operated recently." *Ray* at 475, 283 S.E. 2d at 825. The Court there stated that the car occupied by Ray "apparently" hit the other cars. *Ray* at 473, 283 S.E. 2d at 824. The evidence here was clearly sufficient to permit a finding that the car from which defendant exited was in operation at the time of the collision and that it did collide with the car occupied by the decedent. The cases thus are distinguishable.

Defendant also relies on *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979). *Jackson* establishes that federal habeas corpus review of state criminal convictions will be allowed "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. at 324, 61 L.Ed. 2d at 576-77, 99 S.Ct.

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at 2791-92. We find the evidence here sufficient to permit a rational trier of fact to find proof of guilt beyond a reasonable doubt.

Defendant also contends the court erred in denying his motion to suppress evidence of his breathalyzer test. Evidence offered on *voir dire* supports the court's findings of fact, which in turn sustain the conclusions leading to denial of the motion. The denial thus was not error.

No error.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

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TARA D. ALLEN, BY HER GUARDIAN AD LITEM, CLARENCE ALLEN AND CLARENCE ALLEN, INDIVIDUALLY v. EQUITY & INVESTORS MANAGEMENT CORPORATION AND MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

No. 8110SC681

(Filed 6 April 1982)

**Landlord and Tenant § 9; Negligence § 18— minor injured in common area of apartment—summary judgment improper**

Summary judgment was improperly granted in a negligence action in which a minor plaintiff, age 8, testified that she was injured when her bicycle hit a stump in the recreation area of defendants' apartment building. The issue of whether defendants were negligent in failing to maintain the common area in a safe condition and whether plaintiff was contributorily negligent were for the jury to decide.

APPEAL by plaintiffs from *Bailey, Judge*. Judgment entered 3 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 4 March 1982.

This is a negligence action against defendants for injuries sustained by Tara Allen, the minor daughter of plaintiff Clarence Allen, while riding her bicycle at an apartment complex owned by defendants.

Plaintiffs alleged in their complaint that Tara was injured on 18 April 1979 while riding her bicycle near the playground at

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Bowling Arms Apartments in Cary, where she lived with her parents. The front wheel of her bicycle struck a tree stump, throwing Tara off her bicycle and causing her to fall down an embankment. Tara suffered severe injuries to her wrist. At the time of the injury, Tara was eight years old. Defendant Mutual Life Insurance Company of New York (MONY) owned the apartment complex at the time of the accident and employed defendant Equity & Investors Management Corporation as its rental agent and manager. Plaintiffs alleged that defendants were negligent in leaving the tree stump in an area where children were likely to play and in failing to keep the common area safe. Plaintiffs sought \$100,000 in damages.

In their answer defendants denied all the material allegations of the complaint and pleaded contributory negligence by Tara Allen as a defense.

Tara Allen testified in her deposition that on the day she was injured she had walked her bicycle across a bridge to an area near the recreation center and across the creek from the playground. She was riding her bicycle at a normal speed. The stump she hit was about four to six inches above ground and was not covered by dirt or leaves. Tara testified that if she had been looking down, she could have seen the stump. She hit the stump when she turned her bicycle to go around some trees.

From the granting of defendants' motion for summary judgment, plaintiffs appeal.

*Pinna & Corvette by Ted E. Corvette, Jr. for plaintiff appellants.*

*Johnson, Patterson, Dilthey & Clay by Robert W. Sumner for defendant appellees.*

CLARK, Judge.

The sole issue presented by this appeal is whether the trial court erred in granting defendants' motion for summary judgment. On a motion for summary judgment, G.S. 1A-1, Rule 56, provides that the movant must show the court that there are no genuine issues of material fact to be tried in the case and that the moving party is entitled to summary judgment as a matter of law.

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*Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). The rule does not authorize the court to decide an issue of fact, but rather to determine whether a genuine issue of fact exists. *Id.* Ordinarily, issues of negligence are not susceptible to summary disposition but should be resolved by trial. Summary judgment is appropriate only in exceptional negligence cases because the applicable standard of care must be applied; as a general rule, the jury must apply the standard of care to the facts of the case after proper instructions from the court. *Id.*

It is undisputed that a landlord-tenant relationship existed between plaintiffs and defendants at the time of the accident. It is also undisputed that Tara's accident occurred in an area of the leased premises which remained under the control of defendants. In two recent cases, this court discussed the landlord's duty to keep common areas in a safe condition. *O'Neal v. Kellett*, 55 N.C. App. 225, 284 S.E. 2d 707 (1981); *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702 (1981). "A residential landlord in North Carolina owes his tenant a statutory duty of exercising ordinary or reasonable care to maintain common areas of the leased premises in a safe condition. G.S. 42-42(a)(3). A violation of that duty is evidence of negligence." *O'Neal v. Kellett*, *supra*, at 228, 284 S.E. 2d at 710. The duty owed by a landlord is not the duty to warn of unsafe conditions, but rather the duty to correct unsafe conditions. *Lenz v. Ridgewood Associates*, *supra*. In *Lenz* the court held that if natural accumulations of ice constitute an unsafe condition, the landlord has a duty to correct that condition.

Defendants must be charged with foreseeing that areas set aside for recreational purposes of their tenants would be used as such, and that any unsafe conditions existing in those areas must be corrected. On the issue of defendants' negligence, the evidence shows material facts from which a jury could find that defendants allowed a four- to six-inch stump to remain in a pathway used by tenants and their children for recreational purposes; that the stump constituted an unsafe condition; that defendants knew or in the exercise of ordinary care should have known that the stump existed; that defendants failed to exercise ordinary care to correct the unsafe condition posed by the stump; and that such failure was the proximate cause of Tara's injury. See *Wheeler Terrace, Inc. v. Lynott*, 234 A. 2d 311 (D.C. App. 1967). Defendants argue that a landlord is not liable for injuries from defects



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on their premises which are open, obvious and visible. We believe that there is a question of fact whether the presence of the stump constituted an "unsafe" condition which defendants had a duty to correct. This question and that of defendants' negligence must be passed on by a jury and were not suitable issues for summary disposition by the court.

The materials before us do not show plaintiff Tara Allen to have been contributorily negligent as a matter of law. "An infant under 7 years of age is conclusively presumed to be incapable of contributory negligence. (citation omitted) An infant between the ages of 7 and 14 is presumed to be incapable of contributory negligence, but this presumption may be rebutted by evidence showing capacity. 'The test in determining whether the child is contributorily negligent is whether it acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances.' (citations omitted)." *Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E. 2d 763, 766 (1967). Plaintiff Tara Allen was eight years old at the time of the accident and is therefore presumed incapable of contributory negligence. Defendants may offer evidence at trial to rebut the presumption and to show Tara's capacity to exercise care for her own safety. Again, this issue is one which is properly determined not by the court but by the jury.

The issues of whether defendants were negligent in failing to maintain the common area in a safe condition, and whether plaintiff Tara Allen was contributorily negligent are for a jury to decide. Therefore, the judgment of the trial court must be and is

Reversed.

Judges ARNOLD and WEBB concur.

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**Northwestern Bank v. Moretz**

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**THE NORTHWESTERN BANK v. J. DOUGLAS MORETZ**

No. 8111DC707

(Filed 6 April 1982)

**1. Uniform Commercial Code § 31— direct dealing with party to instrument— defense of non-performance of condition precedent**

Where all the evidence indicated that plaintiff dealt directly with defendant, plaintiff took defendant's note subject to any defense defendant could establish of non-performance of a condition precedent. G.S. 25-3-305(2).

**2. Bills and Notes § 19; Uniform Commercial Code § 29— failure of condition precedent—parol evidence**

Delivery of a note upon a condition which failed may be shown by parol evidence.

**3. Bills and Notes § 20; Uniform Commercial Code § 32— action on note—non-performance of condition precedent—jury question**

In an action to recover the balance due on a promissory note, the evidence presented questions of fact for the jury as to whether the note was delivered subject to a condition precedent that plaintiff would "pursue every possible effort" to collect the sum due from a third party by prosecuting the third party for giving plaintiff a worthless check in payment of the sum due and whether plaintiff had fulfilled such condition.

APPEAL by plaintiff from *Christian, Judge*. Judgment entered 11 February 1981 in District Court, LEE County. Heard in the Court of Appeals 9 March 1982.

*James E. Holshouser, Jr., and Love & Wicker, P.A., by Dennis A. Wicker, for plaintiff appellant.*

*Moretz & Moore, by J. Douglas Moretz and G. Hugh Moore, Jr., for defendant appellee.*

WHICHARD, Judge.

Plaintiff's complaint demanded judgment against defendant for the balance due on a promissory note. Defendant's answer pleaded, *inter alia*, that the note was delivered subject to a condition precedent that plaintiff would "pursue every possible effort" to collect the sum due from one Clyde Baker by prosecuting Baker for giving plaintiff a worthless check in payment of the sum due; and that plaintiff had willfully failed to fulfill the condition precedent, thereby relieving defendant of any obligation.

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**Northwestern Bank v. Moretz**

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Plaintiff's evidence showed the following:

Clyde Baker applied to plaintiff for a loan to enable him to purchase defendant's automobile. Plaintiff initially denied the application, but subsequently approved it upon defendant's co-signing Baker's note. Baker thereafter gave plaintiff a worthless check in purported payment of the note. Defendant thereupon executed the note at issue in payment of the original note.

Acting on defendant's advice, plaintiff instituted criminal charges against Baker on the worthless check. On request of plaintiff's home office legal counsel, however, an officer of plaintiff thereafter informed the prosecuting attorney by letter that plaintiff had no further interest in the prosecution, because it had been paid in full by defendant as endorser.

Defendant's evidence showed the following:

Defendant signed Baker's note to enable Baker to secure funds with which to purchase defendant's automobile. When an officer of plaintiff advised defendant that Baker had given plaintiff a worthless check in purported payment of the note, and that the note was in default, defendant executed a new note to plaintiff. Defendant told plaintiff's officer he would sign the new note if plaintiff would "continue after Clyde Baker . . . , because he [was] the one that ought to have to pay it." Defendant received no new money for signing the new note, and the new note "was delivered . . . on the condition that [plaintiff] continue to proceed after Clyde Baker." The condition was "a verbal condition or understanding" which defendant reached with plaintiff's officer prior to signing the new note.

Defendant subsequently learned of the letter from plaintiff's officer to the prosecuting attorney, which stated that the original note had been paid in full by the endorser and that plaintiff thus had no further interest in the prosecution. He also learned that plaintiff's local counsel had represented Baker on the worthless check charge and had told plaintiff's officer that plaintiff "did not want to be in the position of prosecuting someone on a bad check under those circumstances."

The jury found that the second note was conditioned upon plaintiff's prosecuting Baker for the worthless check and for his

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**Northwestern Bank v. Moretz**

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default on the note; and that plaintiff, through its officer's conduct, breached the condition precedent. Judgment was accordingly entered for defendant, and plaintiff appeals.

Plaintiff's sole contention is that the court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. We find no error.

Plaintiff met its initial burden of proof by introduction of the note at issue, the signing of which was admitted in defendant's answer and his evidence. "When signatures are admitted or established, production of the instrument entitles a holder to recover on it *unless the defendant establishes a defense.*" G.S. 25-3-307(2) (emphasis supplied). See *Wolfe v. Eaker*, 50 N.C. App. 144, 272 S.E. 2d 781 (1980), *disc. rev. denied*, 302 N.C. 222, 277 S.E. 2d 69 (1981). Upon introduction of the note, then, the burden of proof shifted to defendant to establish a defense.

[1, 2] One not a holder in due course takes a note subject to the defense of non-performance of any condition precedent. G.S. 25-3-306(c). A holder in due course takes a note free from "all defenses of any party to the instrument with whom the holder has not dealt." G.S. 25-3-305(2) (emphasis supplied). All the evidence indicates, and plaintiff does not dispute, that plaintiff dealt directly with defendant. It thus, regardless of whether it was a holder in due course, took defendant's note subject to any defense he could establish of non-performance of a condition precedent. Delivery of a note upon a condition which failed may be shown by parol evidence. See *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946); *Galloway v. Thrash*, 207 N.C. 165, 176 S.E. 303 (1934); *Thomas v. Carteret County*, 182 N.C. 374, 109 S.E. 384 (1921).

The motions for directed verdict and judgment notwithstanding the verdict presented the question whether the evidence of defendant's alleged defense of delivery subject to an unfulfilled condition precedent was sufficient to entitle him to have a jury pass on it. If there was "any evidence more than a scintilla" to support prima facie establishment of the constituent elements of the defense, the motions were properly denied. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980), and authorities cited.

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**Northwestern Bank v. Moretz**

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[3] Defendant testified that he told plaintiff's officer he would sign the new note if plaintiff would "continue after Clyde Baker," and that the new note was delivered to the officer on the condition that plaintiff "continue to proceed after Clyde Baker." He also testified regarding the letter from plaintiff's officer to the prosecuting attorney which stated that the original note had been paid in full by the endorser and that plaintiff thus had no further interest in the prosecution. The letter itself was admitted into evidence as an exhibit. The prosecuting attorney testified that he in fact prosecuted the criminal case against Baker, and that he in fact received the letter.

This evidence presented questions of fact for the jury as to whether the note was delivered subject to a condition precedent, and whether plaintiff had fulfilled the condition. The motions for directed verdict and judgment notwithstanding the verdict thus were properly denied.

Plaintiff contends the motions should have been granted, because there was no evidence that the letter from its officer to the prosecuting attorney affected the judgment in the criminal prosecution against Baker. The test of fulfillment of the condition was not the ultimate judgment against Baker, however, but what plaintiff did or failed to do to secure a judgment requiring Baker to pay the sum due. The contention thus has no merit.

Plaintiff's further contentions that (1) the conditional delivery defense constitutes use of criminal process to enforce payment of a civil obligation, and is thus violative of N.C. Const. art. I, § 28, and (2) the conditional delivery defense is unavailable to defendant because he is an attorney and is thus prohibited by DR7-105, Code of Professional Responsibility, from presenting criminal charges solely to obtain an advantage in a civil matter, are equally without merit.

No error.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

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**Cole v. Adams**

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VILA J. COLE v. BEN ADAMS AND WINFRED MORRIS ADAMS

No. 814DC573

(Filed 6 April 1982)

**Husband and Wife § 1— goods purchased by wife—liability of husband**

In an action to recover for goods sold on account to defendant wife, the trial court erred in denying defendant husband's motion for directed verdict where the evidence showed that defendants were separated at the times the items were purchased by the wife and plaintiff failed to show that the items were necessities and that the husband was without justifiable cause in denying the wife such items.

APPEAL by defendant Ben Adams from *Martin (James N.)*, Judge. Judgment entered 18 February 1981 in District Court, ONSLOW County. Heard in the Court of Appeals 3 February 1982.

This is an action wherein plaintiff, operator of a general store, seeks to recover \$528 charged to defendants' account.

Plaintiff's evidence tends to show the following: On 26 June 1977 the defendants were married and lived together approximately five months before separating. They entered into a separation agreement on 24 February 1978 and were divorced 18 January 1980. Plaintiff testified that prior to her marriage defendant Winfred Adams paid off her account with plaintiff and opened an account in both her and defendant Ben Adams' names. Plaintiff presented bills which showed charges from 26 August 1978 through 27 October 1978. She admitted that she had carried a balance forward of \$416.13 but had no knowledge as to when charges totaling this amount were incurred. Plaintiff further admitted that none of the purchases were made by Ben Adams. She terminated Winfred's right to purchase items on account in February 1979 but did not send Ben written notice of the debt and demand payment until 23 October 1980. Winfred admitted that she owed plaintiff \$528.00.

At the conclusion of plaintiff's evidence, Ben moved for a directed verdict in his favor. Upon the court's denial of this motion, Ben testified that he closed all joint accounts at the time he and Winfred signed the separation agreement. This agreement specifically provided that neither party would be responsible for debts of the other incurred after execution of said agreement.

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Cole v. Adams

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The court also denied Ben's motion for a directed verdict made at the close of his evidence. Defendant Ben Adams appeals from the judgment of the trial court ordering him to pay \$528.00 to plaintiff.

*No counsel contra.*

*Lanier and Fountain by Charles S. Lanier, for defendant appellant.*

CLARK, Judge.

We initially note that defendant has failed to set forth any assignments of error and exceptions at the conclusion of the record on appeal or in his behalf. Failure to follow the Rules of Appellate Procedure subjects defendant's appeal to dismissal. *Marsico v. Adams*, 47 N.C. App. 196, 266 S.E. 2d 696 (1980). This Court, however, has decided to exercise its discretionary power and consider the one "issue" argued in defendant's brief on its merit. Plaintiff has not filed a brief.

Defendant argues that the trial court erroneously denied his motion for directed verdict because the plaintiff based her case upon the "Doctrine of Necessities" and failed to meet her burden of proof. Since the case was tried by the court without a jury, defendant's motion will be treated as a motion for involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. The trial court denied defendant's motions to dismiss made at the close of plaintiff's evidence and at the close of all the evidence. This Court has stated that a defendant's motion to dismiss made at the close of all the evidence raises the question of "whether any findings of fact could be made from the evidence which would support a recovery for plaintiffs. (Citation omitted.)" *Neasham v. Day*, 34 N.C. App. 53, 55, 237 S.E. 2d 287, 288-89 (1977).

The "Doctrine of Necessities" as discussed in 2 Lee, North Carolina Family Law § 130 (4th ed. 1980) is used to hold a husband liable to merchants or other outside parties who have furnished necessities to the wife. Necessities, or necessities, "are those things which are essential to her [a wife's] health and comfort, according to the rank and fortune of her husband." *Id.* § 132 at 128.

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Cole v. Adams

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When the husband and wife are living together, a presumption arises that she has been given the authority by the husband to purchase suitable household goods on his credit. . . .

Where the husband and wife are living apart, there is no presumption *in fact* that she has any authority to pledge his credit even for necessities. The presumption is that she has *in fact* no authority. Tradesmen must rebut the presumption by showing authority in fact or else bring the case within the rule that the husband has, without justifiable cause, neglected to provide necessities for her.

*Id.* § 133 at 130-31. Tradesmen must further prove that the merchandise purchased by the wife is a necessity for her; and that the merchandise has not otherwise been supplied to her. *Id.* at 130. The general rule is that "in order to hold the husband liable, a person furnishing necessities to a wife living separate and apart from her husband has the burden of showing that either by agreement or by the husband's fault or misconduct the wife was justified in living apart from the husband and that the husband had failed or neglected to supply her with necessities or to make adequate provision for her support. . . . A person furnishing necessities to a wife living separate and apart from the husband extends credit at his peril; he is bound to take notice of the separation and to ascertain by inquiry whether the circumstances are such as to render the husband liable for the articles furnished." 41 C.J.S. *Husband and Wife* § 52.a. at 516-17 (1944); Annot. 60 A.L.R. 2d 7 (1958).

This common law doctrine was applied in *Pool v. Everton*, 50 N.C. (5 Jones) 241 (1858). There the Court reversed a lower court's judgment awarding \$15 to a physician who had rendered services to defendant's wife. The Court noted that no evidence had been presented which showed that the wife had cause for her separation from defendant. In *Sibley v. Gilmer*, 124 N.C. 631, 32 S.E. 964 (1899), the Court interpreted the holding in *Pool* as follows:

[I]n cases where the husband and wife had separated, no notice of separation need be given to prevent his liability for debts contracted by the wife during the separation—even for necessities—the law being that if the separation was without good cause on the part of the wife, her debt contracted even



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for necessities was not only not binding on the husband, but such creditors made themselves liable to the husband in an action for damages for extending such credit.

*Id.* at 637, 32 S.E. at 965.

In the case *sub judice*, the trial court erroneously found that plaintiff had met her burden of proof. The evidence is uncontested that the parties were separated at the time the items were charged to the account. The balance of \$416.00, which was brought forward on the account, is not at issue. Specifically, plaintiff could not remember whether this amount included items purchased before or after the defendant's marriage. Plaintiff therefore had the burden of showing that the items purchased by Winfred were necessities; and that Ben was without justifiable cause in denying his wife such items. The court entered a finding of fact in its judgment that the items represented in the account were for necessities. This finding is actually a conclusion of law which is unsupported by any evidence.

We hold, therefore, that the trial court erred in denying defendant's motion to dismiss since plaintiff failed to meet her burden of proof. The judgment below is

Reversed.

Judges ARNOLD and WHICHARD concur.

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**In re Kidde & Co. v. Bradshaw**

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IN THE MATTER OF: WALTER KIDDE & COMPANY, INC., POST OFFICE BOX 509, MEBANE, NORTH CAROLINA 27302 v. JACK D. BRADSHAW, ROUTE 1, BOX 365, MEBANE, NORTH CAROLINA 27302, SS. No. 243-70-8340, DOCKET No. 4235 G; ED FISHER, ROUTE 8, BOX 123, BURLINGTON, NORTH CAROLINA 27215, SS. No. 164-44-7593, DOCKET No. 4242 G; GRADY L. HUNDLEY, ROUTE 2, BOX 576, GRAHAM, NORTH CAROLINA 27253, SS. No. 228-28-0475, DOCKET No. 4247 G; DAVID A. TUTTLE, ROUTE 8, BOX 165, BURLINGTON, NORTH CAROLINA 27215, SS. No. 246-84-3231, DOCKET No. 4277 G; AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611

No. 8115SC524

(Filed 6 April 1982)

**Master and Servant § 108.1— unemployment compensation—playing cards not misconduct**

Employees were not discharged for misconduct in connection with their work and thus were not disqualified to receive unemployment compensation benefits where they were accused of and discharged for gambling; the evidence failed to show that they were gambling in that it showed only that they were playing cards on the employer's premises but failed to show that they were playing for anything of value or exchangeable for value; and while gambling among employees was prohibited by the employer, card playing at the work place was not explicitly prohibited.

APPEAL by employer from *McLelland, Judge*. Judgment entered 16 March 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 13 January 1982.

Employer Walter Kidde and Company, Inc., appeals from a Superior Court order affirming an Employment Security Commission decision that four former employees of employer were not disqualified to receive unemployment benefits. A hearing was held before Deputy Commissioner V. Henry Gransee, Jr., following an appeal from the Appeal Referee's decision that claimants not be disqualified for unemployment benefits. An appeal had been taken to the Appeals Referee from a determination of the Claims Adjudicator that claimants were not disqualified pursuant to G.S. 96-14(2).

The evidence presented at the hearing before the Appeals Referee tended to show that on 19 April 1980, at about 1:00 p.m., Maintenance Supervisor Jerry Cummings observed claimants in a maintenance area known as the maintenance "cage." Claimants were sitting around a piece of electronic equipment, approximate-

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**In re Kidde & Co. v. Bradshaw**

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ly 30 inches by 30 inches, which was being utilized as a table. The make-shift surface was not a workbench or something around which employees usually sat. Two large tool boxes, about four and one-half feet tall, had been pushed against the end of the cage, obstructing the view into the cage. The tool boxes were not pushed completely together, however, and Cummings could see into the cage. He observed several stacks of washers before the men and saw one of the employees pass a deck of cards to another. It was not a full deck. The claimants looked sheepish and embarrassed when Cummings entered the cage. None of the men were on break time. They were, however, playing between shifts and were otherwise unoccupied. All four knew that the company has a policy against gambling. They later admitted having played poker, but denied playing for money. They were discharged for gambling on the job.

The Appeals Referee found that while the claimants may have been discharged for cause and for good business reasons, they were not playing cards for money and, therefore, were not gambling as their employer alleged. The Commission adopted the Appeals Referee's decision as its own, upholding his determination that claimants not be disqualified from receiving unemployment benefits. The Superior Court affirmed and employer appeals.

*Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, by Charles P. Roberts, for plaintiff appellant.*

*Gail C. Arneke and C. Coleman Billingsley, Jr., for Employment Security Commission of North Carolina, appellee.*

MORRIS, Chief Judge.

The sole issue on appeal is whether claimants, were discharged because of misconduct associated with their work and are thus disqualified from receiving unemployment benefits.

Findings of fact of the Commission are conclusive if supported by the evidence, and judicial review is limited to determining whether errors of law have been committed. G.S. 96-15(i). The findings of fact to which appellant excepts are as follows:

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**In re Kidde & Co. v. Bradshaw**

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5. The employer alleged they were discharged as a result of having found gambling for money while on company property and during a work day.

6. Each of the parties (claimants) involved denies having done any gambling for money. Each party (claimant) does agree that they were playing cards for a game or two, but not with any betting for money involved. Someone had found an incomplete deck of cards and while waiting for job assignments the four claimants fooled around playing a hand or two of cards.

7. The claimants were not playing cards for money and were not therefore gambling as the employer alleged. An employer witness stated that he thought they were gambling, but had not seen any money being passed. He had only observed washers on what might have been used as a card table.

We hold that these findings are fully supported by the testimony given at the hearing and reflected in the record. The findings of fact are, therefore, binding on appeal.

We hold, furthermore, that the facts support the Commission's conclusion that the claimants were not discharged for misconduct in connection with their work.

An employee will be disqualified for benefits if it is determined that he was discharged for misconduct connected with his work. G.S. 96-14(2). "Misconduct" as that word is used in unemployment compensation law has been defined as

. . . conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee. . . .

*In Re Collingsworth*, 17 N.C. App. 340, 343-44, 194 S.E. 2d 210, 212-13 (1973), quoting *Boynton Cab Company v. Neubeck*, 237 Wis. 249, 259, 296 N.W. 636, 640 (1941), where the Wisconsin Court noted that "mere inefficiency, unsatisfactory conduct . . . are not to be deemed 'misconduct' . . .". *Id.* at 260, 296 N.W. at 640. The facts support a conclusion that there was no wilful or wanton disregard of the employer's interest.

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**State v. Huff**

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Claimants were accused of and discharged for gambling. There is no evidence that the men's card playing amounted to gambling, however. Appellant made no showing that money was passed, or that the washers on the make-shift table around which the employees sat had any value, or that they represented something of value. Appellant argues that its rule against gambling need not be limited to gambling for money. Every definition adduced by the parties depicts gambling as a game of chance in which money or something of value is at stake, however. The criminal offense of gambling in North Carolina, for example, is described as "any game of chance at which any money, property, or other thing of value is bet." G.S. 14-292. There is absolutely no evidence that the claimants' play was for anything, tangible or intangible, of value or exchangeable for value.

It is clear from the record and briefs that gambling among employees is prohibited by Walter Kidde and Company, Inc. Card playing, though perhaps undesirable at the workplace, was not explicitly prohibited. Claimants' conduct, therefore, violated no rule, and the Commission could legitimately conclude that claimants were not engaged in conduct evincing substantial disregard for the standard of behavior to which they were expected to adhere.

The judgment of the Superior Court is, for the reasons stated above,

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. JIM CLAY HUFF

No. 8121SC1073

(Filed 6 April 1982)

**1. Perjury § 2— solicitation of perjury—crime not supplanted by statute**

The common law crime of solicitation of perjury has not been supplanted by the subornation of perjury statute, G.S. 14-210.

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**2. Criminal Law §§ 4, 16.1; Perjury § 1— solicitation of perjury—infamous offense—original jurisdiction in superior court**

Solicitation to commit perjury, or attempted subornation of perjury, is an "infamous offense" which is a felony within the original jurisdiction of the superior court. G.S. 14-3(b).

APPEAL by the State from *Mills, Judge*. Order entered 10 June 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 March 1982.

Defendant was indicted for solicitation to commit the felony of perjury. The indictment alleged that the solicitation was done "in secret and malice, and with deceit and intent to defraud." Through counsel, defendant moved to dismiss the charge in that the indictment failed to charge him with a crime in the manner required by G.S. 15A-924(a) because the common law crime of solicitation of another to commit perjury has been replaced by the statutory offense of subornation of perjury. Defendant also complained that the use of the term "infamous felony" in the charge was vague and indefinite.

At a hearing on 8 June 1981 the trial court dismissed the indictment, *sua sponte*, concluding as a matter of law that solicitation of another to commit perjury is a misdemeanor and therefore not within the original jurisdiction of the superior court under G.S. 7A-271. From the order dismissing the indictment, the State appeals pursuant to G.S. 15A-1445.

*Attorney General Edmisten by Assistant Attorney General Barry S. McNeill for the State.*

*Alexander and Hinshaw by Charles J. Alexander, II, and T. Lawson Newton for defendant appellee.*

CLARK, Judge.

The State challenges the trial court's ruling that the Superior Court of Forsyth County is without jurisdiction to try this case. G.S. 7A-271 and 7A-272 provide that the district court has exclusive and original jurisdiction over trials in all criminal actions below the grade of felony, with several exceptions not here in issue, and that the superior court has exclusive and original jurisdiction over trials of all felony actions.

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[1] Perjury and subornation of perjury are felonies pursuant to G.S. 14-209 and 14-210. Defendant argues that these are the only offenses concerning perjury in North Carolina and asserts that solicitation of perjury as it existed at common law no longer exists, having been supplanted by G.S. 14-210. However, subornation of perjury requires that the State prove two elements: the commission of perjury by the person suborned and the willful procurement or inducement of that person by the suborner. *State v. McBride*, 15 N.C. App. 742, 190 S.E. 2d 658 (1972). Defendant would have us hold that the unsuccessful attempt to suborn perjury is not punishable as a crime. Although we find no North Carolina case law on this point, we agree with the following statement found in 60 Am. Jur. 2d *Perjury* § 68 at 1008 (1972):

“A futile attempt to induce a witness to commit perjury is a crime, being an act done with the intention of preventing the due course of justice. In order to constitute the offense, the act of the accused must be such that it would have resulted in subornation of perjury on his part and perjury on the part of the person attempted to be suborned, if that person had committed the act that the accused endeavored to have him perform.”

[2] Defendant in this case was charged in the indictment in pertinent part as follows:

“ . . . [Defendant] unlawfully and wilfully did feloniously[,] infamously, and in secret and malice, and with deceit and intent to defraud, did [*sic*] corruptly solicit Jeff Cecil to commit the infamous crime of Perjury by corruptly soliciting the said Jeff Cecil to make a false statement of a material fact under oath, . . . ”

The State argues that the solicitation to commit perjury constitutes a felony and is properly within the jurisdiction of the superior court.

Solicitation to commit a felony was a misdemeanor at common law. Perkins, *Criminal Law* 583 (2d ed. 1969). However, G.S. 14-3(b) states: “If a misdemeanor offense . . . be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, . . . be guilty of a felony . . . .”

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The courts of this State have held that attempts to commit a felony are infamous crimes. See *State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965) (attempt to commit crime against nature); *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964) (attempt to commit armed robbery); *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949) (attempt to commit burglary); *State v. Page*, 32 N.C. App. 478, 232 S.E. 2d 460, *disc. rev. denied*, 292 N.C. 643, 235 S.E. 2d 64 (1977) (attempt to obtain money by false pretenses). However, in *State v. Tyner*, 50 N.C. App. 206, 272 S.E. 2d 626 (1980), *disc. rev. denied*, 302 N.C. 633, 280 S.E. 2d 451 (1981), this Court held that solicitation to commit a crime against nature was not an "infamous misdemeanor" so as to be within the original jurisdiction of the superior court. Differentiating between "attempt" and "solicitation," the court stated:

"The gravamen of the offense of solicitation to commit a felony lies in counseling, enticing, or inducing another to commit a crime. (citation omitted) The offense of solicitation is complete with the act of solicitation, even though there never could be acquiescence in the scheme by the one solicited, (citation omitted) and even where the solicitation is of no effect. (citation omitted)

Attempt to commit a felony, on the other hand, involves an intent to commit the felony indicated and an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. . . .

In our view, solicitation to commit a felony and attempt to commit a felony are two separate and distinct offenses. The crime of solicitation, unlike attempt, does not involve an overt act toward the commission of the underlying felony, as the crime of solicitation is complete with the mere act of 'enticing or inducing.' " *Id.* at 207, 272 S.E. 2d at 627.

We believe, however, that the distinction between "attempt" and "solicitation" is not applicable to the offenses of perjury and subornation of perjury. "Strictly speaking it (subornation of perjury) is not a crime that is perpetrated,—it can only be procured. And solicitation, being the most direct and final step in the effort to procure this offense, has properly been recognized as constituting an attempt. It is not attempted perjury, it should be emphasized, but attempted subornation of perjury." *Perkins, supra*,



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at 586. Therefore, following the line of cases which hold that an attempt to commit a felony is an infamous offense, we find that solicitation to commit perjury, or more properly attempted subornation, constitutes an "infamous offense."

The wording of the indictment charges that defendant solicited another to commit perjury in secret and malice, and with deceit and intent to defraud. Deceit and intent to defraud are necessary elements of subornation and attempted subornation of perjury. The person who solicits the perjury must have attempted to counsel, entice, or induce another to deceive the court by a false statement under oath. *See State v. Wilson*, 30 N.C. App. 149, 226 S.E. 2d 518 (1976).

We hold, therefore, that solicitation to commit perjury is a felony within the terms of G.S. 14-3(b), and that the Superior Court of Forsyth County does have original jurisdiction over the offense with which defendant is charged.

The order dismissing the indictment against defendant is reversed and this cause is remanded for trial.

Reversed and remanded.

Judges ARNOLD and WEBB concur.

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LINDA D. HORNEY v. JAMES D. HORNEY

No. 8118DC642

(Filed 6 April 1982)

**Divorce and Alimony § 14.3— insufficient evidence of adultery**

The evidence in a divorce action was insufficient to support a jury finding that defendant husband had committed adultery where it tended to show only that the husband had been alone with another woman on a few occasions in her office and once or twice at her home, but there was no evidence of feelings of love or of affectionate behavior between the two or that they were found together very late at night, in a state of undress or under otherwise suspicious circumstances.

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APPEAL by defendant from *Hatfield, Judge*. Judgment entered 2 September 1980 in District Court, GUILFORD County. Heard in the Court of Appeals 12 February 1982.

This is an action for divorce on grounds of adultery, infliction of indignities and constructive abandonment. The jury found for defendant husband on the issues of indignities and abandonment, and for plaintiff wife on the issue of adultery. Defendant appeals.

Plaintiff's evidence tended to show that the husband had a friendly relationship with one Rebecca Johnson and that the two were alone together on several occasions in Ms. Johnson's office and on at least one occasion at Ms. Johnson's home. Ms. Johnson made telephone calls to defendant when he was out of town on business and admitted in her testimony that they were friends, but denied being in love with defendant or having a sexual relationship with him. The wife testified that the husband was often absent from home on Saturday afternoons prior to the parties' initial separation in 1979. After the parties reconciled a few months later, the husband refused to sleep with the wife and was often away in the evenings. There was also evidence that the husband physically abused the wife and once offered her \$10,000 if she would "let him see his girl friend."

Defendant's evidence was that he stopped sleeping with his wife because of her "tantrums." He testified that he had not committed adultery and that he had not offered his wife money to allow him to see a girl friend.

*Walker, Dowda, Ray & Warren, by Perry N. Walker and J. Bruce Morton, for plaintiff appellee.*

*Lunsford and West, by John W. Lunsford, for defendant appellant.*

ARNOLD, Judge.

Defendant brings forward numerous assignments of error relating to the admissibility of certain evidence. While we find it unnecessary to reach these contentions in the disposition of defendant's appeal, we note at the outset that we have considered each of them and found them to be without merit. Nevertheless, while we hold that there was no error in the admission of various circumstantial evidence, and although we recognize that

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circumstantial evidence may be sufficient to support a finding of adultery, we conclude that there was insufficient evidence to support the verdict in the case before us.

As plaintiff wife correctly points out, there exists no clear standard for determining the sufficiency of proof of adultery. Indeed, even the doctrine of "inclination and opportunity," which has been the rule most often cited by the courts, has been subjected to exceptions and conflicting interpretations. *See Owens v. Owens*, 28 N.C. App. 713, 222 S.E. 2d 704 (1976). The Court is concerned that this lack of a clear standard has resulted in precisely that which this Court and our Supreme Court have repeatedly held to be impermissible—trial by "suspicion and conjecture." *State v. Gordon*, 225 N.C. 757, 36 S.E. 2d 143 (1945); *Owens v. Owens*, *supra*.

The difficulty inherent to obtaining evidence of the existence of a supremely private relationship, particularly in view of the complaining spouse's disability to testify thereto, has led to almost wholesale jury discretion in this area of the law. In *Owens*, *supra*, for example, this Court held that the issue should have been submitted to the jury in spite of a total absence of evidence indicating "adulterous disposition" where the accused wife slept in the same house with another man. It appears, therefore, that opportunity alone may now be sufficient to support a jury verdict of adultery if the opportunity is great enough. In *Owens*, evidence that the two sometimes left the house at the same time and that they were seen shopping together was found sufficient to suggest the requisite "incriminating circumstances."

Given the highly emotional nature of the subject matter, and the degree to which individual jurors' attitudes regarding propriety may vary, we feel a more definite line must be drawn between permissible inference and mere conjecture. In the case at bar, the husband was shown to have been alone with another woman on a few occasions in her office and once or twice at her home. There was no evidence showing that they were found together very late at night, in a state of undress or under otherwise suspicious circumstances. Nor was there any evidence of feelings of "love" or of affectionate behavior between the two. All we apparently have are bits and pieces of circumstantial evidence from which the jury concluded that an adulterous affair had taken

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place. We cannot find that this was enough evidence on which to adjudicate the parties' legal rights. Indeed, to hold otherwise would be to subject virtually all friendships between men and women, however innocent, to legal scrutiny.

We find it ironic that the same jury which found the evidence sufficient to conclude defendant committed adultery found defendant did not inflict indignities on his wife. We fail to see, on the facts of this case, how the evidence could have supported the issue on adultery without dictating a finding that he also offered such indignities as to render plaintiff's life intolerable. However, plaintiff has failed to raise the issue of indignities on appeal and we cannot properly consider it.

Having concluded that the trial court erred in denying defendant's motion for a directed verdict on the question of adultery, the defendant is entitled to have that portion of the judgment vacated and reversed. The judgment in all other respects is affirmed.

Reversed in part and affirmed in part.

Judges CLARK and WHICHARD concur.

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STATE OF NORTH CAROLINA v. DOUGLAS ATKINS

No. 8127SC1113

(Filed 6 April 1982)

**Burglary and Unlawful Breakings § 5.1; Criminal Law § 60.5— insufficiency of fingerprint evidence**

Evidence that defendant's fingerprint was found on an air conditioner which had been removed from the outside wall of a pawn shop during a breaking and entering of the shop was insufficient to support the conviction of defendant for breaking and entering the pawn shop where there was no other evidence tending to connect defendant with the crime, and there was substantial evidence that defendant had been lawfully in or around the building in which the pawn shop was located at times other than when the crime was committed.

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APPEAL by defendant from *Kirby, Judge*. Judgment entered 10 July 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 11 March 1982.

Defendant appeals from a judgment of imprisonment entered upon a conviction for breaking and entering.

*Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.*

*Robert W. Clark, Assistant Public Defender, for defendant appellant.*

WHICHARD, Judge.

The dispositive issue is whether the court erred in denying defendant's motion to dismiss. We hold that it did.

Defendant was charged with feloniously breaking and entering a building occupied by The Pawn Shop of Gastonia, Inc., and with felonious larceny of personal property therefrom. The State's evidence showed the following:

An employee who closed The Pawn Shop on 10 March 1981 observed that the air conditioner in the rear wall was in place when she departed. The next morning one of the owners noticed a hole where the air conditioner had been, and he subsequently saw the air conditioner on the ground outside the building. He also observed a hole in a partition between two rooms in the back of the building. An inventory revealed that property belonging to the Shop worth approximately \$12,000 was missing. A hardware store had been located in the building until The Pawn Shop had moved in approximately one week before the breaking, and it had used the same air conditioner.

A police officer who qualified without objection as a fingerprint expert dusted the air conditioner and many areas inside the store for latent fingerprints. He secured fingerprints from the bottom left of the air conditioner, which would have been outside the building had the air conditioner been installed in the hole, which prints matched those subsequently taken from defendant. He had no way to determine exactly how long the prints had been on the air conditioner.

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Defendant told another police officer that he had gone to The Pawn Shop on 23 February 1981 and had pawned a silver quarter. He also told this officer he had not been to The Pawn Shop since then, and that he did not remove an air conditioner there.

Defendant testified in his own behalf as follows: He lived about a block and a half from The Pawn Shop. In the past he had helped a man who ran the hardware store when it was in the building to which The Pawn Shop had moved. His work consisted of cleaning up behind the building. There was an air conditioner in the back wall when he was working there. He did not remember touching its bottom left hand side, but he could have done so. He worked there "in early February or late January," and a man named Ernest paid him. He did not steal, or assist anyone in stealing, from The Pawn Shop.

Ernest Clemmons testified on rebuttal for the State that he was employed by the hardware store; that defendant had worked there in May, 1980; but that to the best of his knowledge defendant had not been employed by the store in January or February, 1981. Defendant had asked him for a job in January or February, 1981, but he did not have any work for him.

The standard for determining the sufficiency of fingerprint evidence to withstand a motion to dismiss has been stated as follows:

[T]estimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.

What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury.

*State v. Miller*, 289 N.C. 1, 4, 220 S.E. 2d 572, 574 (1975). In *Miller* one of the factors on the basis of which the Supreme Court held

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the motion to dismiss was properly denied was that "[t]here [was] no evidence whatsoever that defendant was *lawfully* in or around the [building in question] at any time." *Miller* at 6, 220 S.E. 2d at 575. Here, by contrast, there was substantial evidence that defendant had been lawfully in or around the building in which The Pawn Shop was located at times other than when the offenses charged were committed.

In *State v. Irick*, 291 N.C. 480, 492, 231 S.E. 2d 833, 841 (1977), our Supreme Court observed that the fact, standing alone, that a fingerprint of defendant there had been found on the inside frame of a window, through which items had been removed from a burglarized house, did not constitute the requisite "'substantial' evidence that the print could have only been impressed at the time of the alleged burglary." *See also State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979).

Here, too, the fingerprint evidence stood alone. It was not "accompanied by substantial evidence of circumstances from which the jury [could] find that the fingerprints could only have been impressed at the time the crime was committed . . . ." *Miller* at 4, 220 S.E. 2d at 574. No other evidence tended in any way to connect defendant to the offenses charged. Hence, judged by the standard of the foregoing cases, the evidence was insufficient to withstand the motion to dismiss.

The judgment is therefore vacated, and the cause is remanded to the trial court for entry of judgment of dismissal.

Vacated and remanded.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

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County of Brunswick v. Town of Bolivia

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COUNTY OF BRUNSWICK, NORTH CAROLINA v. TOWN OF BOLIVIA,  
NORTH CAROLINA

No. 8113SC650

(Filed 6 April 1982)

**Municipal Corporations § 2.1— annexation—no petition signed by owners of area to be annexed**

The trial court properly ordered and declared the annexation by defendant of property owned by plaintiff illegal, null and void since pursuant to G.S. 160A-58.1, the annexation must have been initiated by a petition signed by all the owners of real property in the area sought to be annexed, and, as the proposed annexed area was solely owned by Brunswick County, a petition signed by residents within and without the Town of Bolivia was not sufficient.

APPEAL by defendant from *Bowen, Judge*. Judgment entered 26 May 1981 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 1 March 1982.

Defendant appeals from a declaratory judgment that its annexation of non-contiguous property pursuant to G.S. 160A-58.1 is null and void because of an invalid petition.

The parties have stipulated to the following facts. Plaintiff is a political subdivision of the government of the State of North Carolina. Defendant is a municipal corporation in Brunswick County. In a 1975 referendum, voters of Brunswick County approved the removal of the county seat from Southport, North Carolina, to an unincorporated location in the geographical center of Brunswick County. Pursuant to that referendum, the county seat was moved to the new Brunswick County Governmental Center in 1978.

On 17 September 1980, there was a hearing in the Town Hall of the Town of Bolivia to consider a petition for the annexation of the 38.5 acre tract upon which the Brunswick County Governmental Center is located. The petition had been signed by various residents within and without the Town of Bolivia. It had not been signed by any member of the Governing Board of Brunswick County or by all of the citizens and taxpayers of Brunswick County.

As a result of the hearing, the Town Council voted to annex the property upon which the county governmental center is located.



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Plaintiff brought an action for a declaratory judgment that the annexation was illegal. The court concluded that the petition circulated pursuant to G.S. 160A-58.1 was invalid because it was not signed by all the owners of the real property described in the area sought to be annexed. The court ordered and declared that the annexation was illegal, null and void.

*John R. Hughes, for plaintiff appellee.*

*Algernon L. Butler, Jr., for defendant appellant.*

VAUGHN, Judge.

Defendant argues that the petition to annex property upon which the Brunswick County Governmental Center is located meets the requirements of G.S. 160A-58.1. We disagree.

The extension of the boundaries of a town or city is a legislative function. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972). A municipal corporation has no power to extend its boundaries by annexation other than that delegated to it by legislative enactment or constitutional provision. *In re Annexation Ordinance*, 296 N.C. 1, 249 S.E. 2d 698 (1978); 2 E. McQuillin, *The Law of Municipal Corporations* § 7.13 (3rd ed. 1979).

North Carolina allows a city to annex a non-contiguous area pursuant to G.S. 160A-58.1. According to that statute, the annexation must be initiated by a petition signed by all the owners of real property in the area sought to be annexed. Excepted from signing are owners of real property that is wholly exempt from property taxation under the Constitution and laws of North Carolina.

When the power to annex territory is delegated to a municipal corporation, it must be exercised in strict accord with the conferring statute. *In re Annexation Ordinance*, 296 N.C. at 17, 249 S.E. 2d at 707. The present petition was signed by residents within and without the Town of Bolivia. None of them, however, were property owners of the area sought to be annexed. Nothing in G.S. 160A-58.1 requires or authorizes the signatures of non-property owners. The court, therefore, properly excluded consideration of the fifty-nine signatures on the petition.

The sole property owner of the proposed annexed area was Brunswick County. Defendant correctly points out that the Coun-

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ty was not required to sign the petition because it is a tax-exempt property owner. There was, however, no one else authorized to seek annexation. The court properly declared the annexation illegal, null, and void.

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. WALTER LEE BRYANT, JR.

No. 8117SC1101

(Filed 6 April 1982)

**Criminal Law § 86.3—impeachment of defendant—admission of prior conviction—further improper cross-examination**

In a prosecution for breaking and entering in which defendant testified on cross-examination that he had been convicted of stealing a police radio from a police station, the trial court erred in permitting the State to further cross-examine defendant as to the details of the theft and his subsequent use of the radio to harass the police, since the cross-examination not only attacked defendant's credibility but also tended to establish him as a person who lacked respect for the law and for those who enforce it.

APPEAL by defendant from *Lamm, Judge*. Judgment entered 6 May 1981 in Superior Court, SURRY County. Heard in the Court of Appeals 10 March 1982.

Defendant was indicted for the felonious breaking and entering of a residence. The State's principal witness was Kenneth Holt, who testified that he, defendant, and two other persons entered the residence of Pauline Fulk on the afternoon of 25 October 1980 and removed various items of property from the house. The following day, Holt confessed his participation to Deputy Sheriffs Richard Bowman and Roger Cook. Officer Cook agreed not to oppose probation for Holt in return for his testimony against defendant. The two officers corroborated Holt's testimony. Pauline Fulk identified a number of items of property taken from her house.

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Defendant presented alibi evidence, including his own testimony. From judgment entered on the jury's verdict of guilty, defendant appeals.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.*

*Adam Stein, Appellate Defender, by Assistant Appellate Defender James H. Gold, for defendant-appellant.*

WELLS, Judge.

In one of his assignments of error, defendant contends that the trial court erred in allowing the State to cross-examine defendant as to the details of a prior conviction. The following excerpt from the record provides the basis for this assignment:

Q. What have you been tried and convicted of, Mr. Bryant?

A. I have been tried and convicted of a felony.

Q. What felony?

A. What do you mean?

Q. What felony was it that you were convicted of exactly, sir?

A. For stealing a radio out of a police station at Pilot Mountain.

Q. Stealing a radio out of a police station?

A. Yes, sir.

Q. Did you go in the station and take it out?

A. Yes, sir.

MR. EVERETT: Objection.

COURT: Overruled.

Q. You took that police radio up and down the streets of Pilot Mountain and talked back to the policemen on their radio, didn't you?

A. Yes.

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Q. Telling them that you were on such and such a corner; then run away and radio back and tell them where you were again; when they would come toward you, you would run to another corner; isn't that correct?

A. Yes, I did.

Q. You kept that up having them scurrying all over town while all the time you were having a big time with their radio and them running after you, right?

MR. EVERETT: Objection.

COURT: Overruled.

A. Yes, I was drinking at the time and thought I was having fun.

Q. So you admit you were bold enough to go in the police department in broad daylight and take their property out into the streets—

MR. EVERETT: Objection, Your Honor.

COURT: Sustained.

We find that the extent and character of the inquiry here far exceeds the bounds established by our Supreme Court in *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977), where the court held that "[w]here a conviction has been established, a limited inquiry into the time and place of conviction and the punishment is proper." *Id.*, at 141. Not only does the cross-examination in this case attack defendant's credibility; it tends to establish him as a person who lacks respect for the law and those whose duty it is to enforce it, thus suggesting to the jury his guilt in this case.

Defendant's remaining assignment of error is based on exceptions to testimony he did not object to at trial. These exceptions may not be asserted on appeal. *See* App. R. 10(b)(1).

In addition to the active sentence given in this case, the defendant's probation in two other cases was revoked. The judgments below are vacated and defendant is to have a new trial.

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**Robinson v. Robinson**

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Vacated;

New Trial.

Judges HILL and BECTON concur.

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BARBARA KAY S. ROBINSON v. GARY A. ROBINSON

No. 8120DC670

(Filed 6 April 1982)

**Divorce and Alimony § 1— jurisdiction in action for permanent alimony**

In an action in which plaintiff sought divorce from bed and board and permanent alimony, the trial court properly found it had jurisdiction over defendant under G.S. 1-75.4(12) since defendant was married in North Carolina, he and plaintiff resided as husband and wife in North Carolina, and defendant's alleged abandonment of plaintiff was an act occurring within the State.

APPEAL by defendant from *Huffman, Judge*. Judgment entered 29 January 1981 in District Court, MOORE County. Heard in the Court of Appeals 3 March 1982.

Defendant appeals from the denial of his motion to dismiss for lack of jurisdiction.

Plaintiff and defendant were married on 29 October 1978 in Moore, County, North Carolina. On or about 25 June 1979, defendant removed himself from North Carolina to Naples, Florida. He filed a petition for dissolution of marriage in Hendry County, Florida, on 27 December 1979. Plaintiff was not personally served. The action was dismissed by the court, as was a subsequent motion for annulment filed by defendant in Pineallas County, Florida.

On 29 January 1980, plaintiff filed an action in North Carolina, alleging that defendant had abandoned her and rendered her life burdensome and intolerable. She sought divorce from bed and board, permanent alimony, and an injunction against defendant's filing in Florida courts for a divorce. The summons and verified complaint were personally served on defendant on 14 February 1980.

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**Robinson v. Robinson**

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On 14 February 1980, defendant filed an action for absolute divorce in Collier County, Florida, on the grounds of an irretrievably broken marriage. He attempted service on plaintiff by publication. On 28 March 1980, defendant was granted a final judgment of divorce.

On 14 April 1980, defendant moved to dismiss plaintiff's North Carolina action on the grounds of lack of subject matter and personal jurisdiction. The court denied defendant's motion.

*David G. Crockett, for plaintiff appellee.*

*Seawell, Robbins, May and Rich, by P. Wayne Robbins, for defendant appellant.*

VAUGHN, Judge.

Defendant's only assignment of error is whether the court erred in finding the defendant was subject to the jurisdiction of the North Carolina Courts.

Although the argument is not grounded in an assignment of error, defendant attempts to argue that plaintiff's present claim should have been asserted as a compulsory counterclaim in the divorce action he started in Florida on 27 December 1979. In the first place, there was never personal service on plaintiff in that action. Second, the record fails to disclose that the action was pending at the time plaintiff started the present action. For these reasons, among others, the argument is without merit.

Although plaintiff has the right to bring her present action for alimony, pursuant to G.S. 50-11(d), North Carolina cannot render a valid alimony judgment against defendant unless it has personal jurisdiction over him. *Fleek v. Fleek*, 270 N.C. 736, 155 S.E. 2d 290 (1967). Defendant asserts that any exercise of jurisdiction over his person, pursuant to G.S. 1-75.4, violates the due process clause of the Fourteenth Amendment. We disagree.

Our Supreme Court has interpreted our long-arm statute as asserting personal jurisdiction over non-resident defendants to the full extent permissible under federal due process. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). There is a twofold inquiry. We must first determine whether the North Carolina statute permits jurisdiction over this particular defend-

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**Robinson v. Robinson**

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ant. The second inquiry is whether the exercise of jurisdiction will violate due process. *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E. 2d 640, *cert. denied*, 297 N.C. 300, 254 S.E. 2d 920 (1979).

G.S. 1-75.4(12) provides that North Carolina has personal jurisdiction "[i]n any action under Chapter 50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State." The present parties were married in North Carolina, and plaintiff continues to reside in the State. Furthermore, an action for alimony based on abandonment is considered a claim of "injury to person or property" under G.S. 1-75.4(3). *Brown v. Brown*, 47 N.C. App. 323, 267 S.E. 2d 345 (1980). The court, therefore, properly concluded that North Carolina's statute permits jurisdiction over defendant.

Due process requires minimum contacts with the State such that maintenance of the suit will not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The present defendant was married in North Carolina. He and plaintiff resided as husband and wife in North Carolina. Defendant's alleged abandonment of plaintiff was an act occurring within the State. We conclude that the "minimum contacts" test has been satisfied.

The court properly denied defendant's motion to dismiss.

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

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**Sutton v. Sutton**

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SAROBIA SUTTON v. KENNETH W. SUTTON

No. 8120DC727

(Filed 6 April 1982)

**Divorce and Alimony § 24; Parent and Child § 7.3— failure to deny paternity—defense of non-paternity barred in subsequent action**

Defendant's failure to deny paternity in a divorce action in which the issue of paternity was duly raised in the complaint barred a defense of non-paternity in a subsequent action for child support between the same parties.

APPEAL by defendant from *Burris, Judge*. Judgment entered 26 February and 5 March 1981 in District Court, UNION County. Heard in the Court of Appeals 11 March 1982.

Defendant brings this appeal from two orders in which the trial court held that the issue of defendant's paternity of plaintiff's minor child had been finally adjudicated in plaintiff's 1976 divorce action and that defendant was liable for child support.

Plaintiff brought this action against defendant in 1979 for support of their minor child. She alleged that defendant had refused to pay anything for support of his son despite plaintiff's repeated demands. Defendant responded by denying paternity and moved for blood grouping and tissue tests to determine whether he was the father of the child. This order was granted, but later set aside on grounds that the issue of paternity had been adjudicated in the parties' divorce proceeding. From an order granting plaintiff child support and attorney's fees, defendant appeals.

*Perry and Bundy, by H. Ligon Bundy, for plaintiff appellee.*

*Charles D. Humphries for defendant appellant.*

ARNOLD, Judge.

Defendant's sole argument on appeal is that the trial court erred in denying his motion for a paternity test. Defendant contends that the 1976 divorce judgment is not determinative of the issue of paternity because the court made no findings of fact concerning that issue. It is true that no express finding on this issue



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Moore v. Insurance Co.

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was set forth in the divorce order. However, plaintiff raised the issue in her complaint and the court impliedly addressed it by granting defendant visitation privileges and ordering him to pay child support. Moreover, defendant failed to appear or to raise his defense in the original action although he was properly served with process. As this Court stated in *Williams v. Holland*, 39 N.C. App. 141, 148, 249 S.E. 2d 821, 826 (1978), "[i]t is a well established principle in North Carolina . . . that a valid judgment is binding on the parties to it 'as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of due diligence, could and should have brought forward.' *Bruton v. Light Co.*, 217 N.C. 1, 7, 6 S.E. 2d 822, 826 (1940)."

The trial court correctly held that defendant's failure to deny paternity in the original action between the parties, wherein the issue was duly raised in the complaint, operates as a bar to the defense in the subsequent action between the same parties.

Affirmed.

Judges CLARK and WEBB concur.

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MAXINE V. MOORE, AS EXECUTRIX OF THE ESTATE OF ALLAN PRATT MOORE, AND  
MAXINE V. MOORE, INDIVIDUALLY v. UNION FIDELITY LIFE IN-  
SURANCE COMPANY

No. 8121DC651

(Filed 6 April 1982)

**Insurance § 67.3— death benefits under accident policy—instructions on burden of proof**

In an action to recover death benefits under an accident policy wherein plaintiff presented evidence that insured's death was caused by the unexplained firing of a pistol and defendant presented evidence that the death was suicide, the trial court did not err in instructing the jury that if it was unable to determine where the truth lies about insured's death, it should not find an accidental death since defendant's evidence that the death resulted from suicide was offered not to establish an affirmative defense but to rebut the presumption that the death was by accidental means; defendant's evidence was sufficient to rebut such presumption; and the court's instruction properly allocated to plaintiff the burden to prove that the death was by accidental means.

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Moore v. Insurance Co.

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APPEAL by plaintiff from *Tanis, Judge*. Judgment entered 22 January 1981 in District Court, FORSYTH County. Heard in the Court of Appeals on 1 March 1982.

This appeal arises from plaintiff's action to recover on an insurance policy insuring plaintiff's husband, Allan Moore, "against loss incurred by the insured resulting directly and independently of all other causes from accidental bodily injury." Plaintiff sought to invoke the benefits of such policy upon the death of her husband who died as a result of a gunshot wound on 14 September 1973. The policy insuring Allan Moore contained the following provision: "EXCEPTIONS: The insurance provided by this policy does not cover death, disability, or other loss which is caused: . . . (2) by suicide or any attempt thereat (sane or insane) . . . ." At trial, plaintiff presented evidence tending to show that Allan Moore's death was caused by unexplained violence of external means, to wit, the firing of a gun, and defendant presented evidence tending to show that Allan Moore's death was suicide and was caused by his intentionally shooting himself with a gun. The jury was presented the following issue: "Was the death of the Plaintiff's deceased a result of accidental bodily injury?" The jury answered in the negative and the court ordered "that the plaintiff have and recover nothing on her claim against the defendant." Plaintiff appealed.

*Keith & Smithwick, by Thomas J. Keith for plaintiff appellant.*

*Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by James H. Kelly, Jr., for defendant appellee.*

HEDRICK, Judge.

The sole argument propounded by plaintiff in her brief is that "[t]he trial court committed prejudicial error by instructing the jury that if they were unable to determine where the truth lies that the insured died as a result of a self-inflicted gunshot wound, that they should not find an accidental death." Plaintiff argues that defendant's contention that Allan Moore's death was suicide is an affirmative defense for which defendant bears the burden of persuasion, and that the court erred in failing to so instruct.

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Moore v. Insurance Co.

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Our decision on this appeal is controlled by *Moore v. Union Fidelity Life Insurance Co.*, 297 N.C. 375, 255 S.E. 2d 160 (1979), when this same case was before our Supreme Court.

In the present case, plaintiff "had the burden of showing that her husband died as a result of accidental bodily injury within the meaning of the policy issued by defendant." *Moore, supra* at 378, 255 S.E. 2d at 162. Plaintiff did present evidence tending to show that Allan Moore's death was caused by unexplained, violent, and external means. Such evidence raised a presumption that his death was by accidental means; such a presumption, however, "in no event . . . operate[s] to relieve the plaintiff of the burden of persuasion on the issue of accidental death." *Moore, supra* at 382, 255 S.E. 2d at 165. Furthermore, "[i]f evidence of non-accidental death is presented, then the presumption *per se* no longer applies, and the question of accidental death is one for the jury," *Moore, supra* at 382, 255 S.E. 2d at 165.

The evidence offered by defendant which tended to show that Allan Moore's death was a suicide was not, as plaintiff contends, offered to establish an affirmative defense. Rather, such evidence was "evidence of non-accidental death" offered to rebut the presumption of accidental death. The mere presentation of such evidence was sufficient to enable defendant to avoid the mandatory effect of a presumption and to permit the jury to decide, without any peremptory instructions, whether the death was accidental. *Moore, supra*. Defendant, to avoid an instruction that the jury must find an accidental death if it believed the evidence of violent and unexplained death, did not have to prove suicide by a preponderance of the evidence but needed only to present evidence tending to rebut the presumed fact that the death was accidental, *Moore, supra*, and defendant presented such evidence. The burden of persuasion in the present case remained on plaintiff to prove that the death was by accidental means. *Moore, supra*. This burden was properly allocated by the trial court in the instruction challenged by the exception upon which this assignment of error is based. Plaintiff's assignment of error is overruled.

In the trial below, we find

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**Durham County v. Riggsbee**

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No error.

Chief Judge MORRIS and Judge VAUGHN concur.

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DURHAM COUNTY AND ELLEN MARIE CAPPARELLA v. HAROLD STEVE RIGGSBEE

No. 8114DC704

(Filed 6 April 1982)

**Bastards § 9— inability to relitigate paternity**

The trial court lacked authority to attempt to relitigate an issue of paternity since the issue had been finally determined more than three years earlier.

APPEAL by plaintiffs from *Galloway, Judge*. Order entered 23 April 1981 in District Court, DURHAM County. Heard in the Court of Appeals 8 March 1982.

*Durham County Attorney's Office, by Assistant County Attorneys Thomas Russell Odom and S. C. Kitchen, for plaintiff appellants.*

*Clayton and Myrick, by Ronald G. Coulter, for defendant appellee.*

VAUGHN, Judge.

On 13 October 1976, defendant was ordered to pay plaintiff Capparella, defendant's former wife, \$40.00 each week for the support of a minor child which the court found to have been born to the marriage. The issue of paternity was raised and fully litigated in that proceeding. Defendant did not appeal and complied with the order through January 1978.

Plaintiff Capparella began receiving public assistance in the form of AFDC through the Durham County Department of Social Services and that resulted in the assignment of her right to obtain child support under the provisions of G.S. 110-137. In February 1981, plaintiff County filed a motion in the cause seeking wage garnishment pursuant to G.S. 110-136 to enforce the child support order.

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Finger v. Carter

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Defendant then filed a "Motion for Discovery and Stay of Proceedings." The motion was filed under General Statute Rule 35(a). He alleged that he had learned of "a different and reportedly more reliable method for testing a child's paternity. . . ."

On 23 April 1981, Judge Galloway entered an order requiring the mother, father and their child to submit themselves to a tissue typing test, and ordered that the garnishment proceeding be stayed pending the results of the tests.

The judge's lack of authority to attempt to relitigate an issue that had been finally determined more than four years earlier is so obvious that no discussion of the question need be made.

The order is void, and the same is hereby vacated.

Vacated.

Chief Judge MORRIS and Judge HEDRICK concur.

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M. NEIL FINGER AND REBECCA B. FINGER v. COLEMAN CARTER AND VIRGINIA H. CARTER

No. 8123DC721

(Filed 6 April 1982)

**Bills and Notes § 20— defense to action on note—summary judgment improper**

In an action to recover the balance due on a promissory note, the issue of whether, in consideration of the execution of the note, plaintiffs executed a written agreement to convey a 25% interest in a 158 acre tract of land was not resolved by plaintiffs' delivery of a quitclaim deed to the 158 acre tract which they say they do not own, and the trial court erred in entering summary judgment for plaintiffs on the basis of the quitclaim deed.

APPEAL by defendants from *Ferree, Judge*. Judgment entered 6 May 1981 in District Court, YADKIN County. Heard in the Court of Appeals 10 March 1982.

Plaintiffs sue for the balance due on a note executed by defendants. Defendants admit the execution of the note. They contend, however, that they are entitled to a set-off in the amount of the balance due because of plaintiffs' alleged failure to carry out

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**Finger v. Carter**

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the terms of a written contract for which the note was given. In consideration for the note defendants allege plaintiffs agreed to transfer, among other things:

“(c) . . . a 25% interest in a 158 acre tract of land located in Ashe County, State of North Carolina; the defendants allege and say that the plaintiffs never complied with this provision of this Agreement.”

Plaintiffs moved for summary judgment. By affidavit, they deny ever owning any interest in the 158 acre tract and deny ever agreeing to convey the land to defendants. In their affidavit, they agreed to execute a quitclaim deed to the tract. Their motion for summary judgment was denied by Judge Osborne on 5 May 1981. The case come on for trial on 5 May 1981 before Judge Ferree. On the morning of the trial, a quitclaim deed from plaintiffs to defendants was delivered to defendants. The judge then concluded that there was no genuine issue of fact and entered summary judgment for plaintiffs.

*Finger, Park and Parker, by Raymond A. Parker II, for plaintiff appellees.*

*Steven P. Pixley, for defendant appellants.*

VAUGHN, Judge.

The judgment must be reversed. The issue of whether, in consideration of the execution of the note, plaintiffs executed a written agreement to convey a 25% interest in a 158 acre tract of land in Ashe County remains. It certainly was not resolved by the delivery of a quitclaim deed to land they say they do not own.

Reversed.

Chief Judge MORRIS and Judge HEDRICK concur.

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**State v. Borg**

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STATE OF NORTH CAROLINA v. JOHNNY A. BORG

No. 8112SC791

(Filed 6 April 1982)

APPEAL by defendant from *Brannon, Judge*. Judgment entered 25 February 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 January 1982.

Defendant was charged with first degree burglary and second degree rape. He pled not guilty to both counts. The evidence adduced at trial tended to show that defendant on 18 October 1980 broke into Angela Schermerhorn's apartment in Fayetteville and had sexual relations with her against her will. The jury found defendant guilty as charged. Defendant appeals from a judgment of imprisonment.

*Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the state.*

*Assistant Public Defender Gregory A. Weeks for defendant appellant.*

MORRIS, Chief Judge.

Counsel for defendant concedes that he finds no prejudicial error in defendant's trial but requests this Court to examine the record for error. Because of the position of the majority of the Supreme Court of the United States in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967), *reh. den.* 388 U.S. 924, 87 S.Ct. 2094, 18 L.Ed. 2d 1377 (1967), we have carefully reviewed the entire record of the defendant's trial to determine whether the record contains anything which "might arguably support the appeal" and whether the "case is wholly frivolous". In a dissent, in which Mr. Justice Black and Mr. Justice Harlan joined, Mr. Justice Stewart most aptly pointed out that if the record did in fact present any such arguable issues, the appeal would not be frivolous and counsel certainly would not have filed a brief in which he took the position that the appeal is without merit.

A careful review of all proceedings below convinces us that defendant received a fair trial free from prejudicial error. The appeal is wholly frivolous and totally without merit.

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**State v. Earnhardt**

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No error.

Judges VAUGHN and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. VICKIE ANN EARNHARDT AND WILLIAM  
CARL KELLER

No. 8119SC697

(Filed 20 April 1982)

**1. Criminal Law § 157— failure to include proper parts of record—subject to dismissal**

Where defendant failed to include in the record on appeal copies of either the verdict, judgment, notice of appeal or appeal entry, although the information contained in those documents appeared in the record in various places, defendant's case was technically subject to dismissal.

**2. Criminal Law § 11— accessory after fact of voluntary manslaughter—sufficiency of evidence**

The evidence was sufficient to survive defendant's motion to dismiss the charge of accessory after the fact of voluntary manslaughter on the ground that the evidence failed to show that defendant knew the offense had been committed, where the evidence tended to show that defendant knew, before proposing a false story to be told to authorities, that decedent and two men had been fighting, that decedent was left very near to or on the road, and that decedent had been struck and killed by an automobile.

**3. Criminal Law § 102.1— closing argument of district attorney—supported by evidence—portion of argument omitted from record**

The district attorney's characterization in his closing argument that those present at the scene of a crime were "acting like a pack of wolves," did not torture the sense of the record so as to mislead the jury or deprive defendant of a fair trial. Further, a portion of the district attorney's remarks were absent from the record, and when a portion of the argument is omitted from the record, the argument is presumed proper.

**4. Criminal Law § 117.4— instruction regarding State's witness**

An instruction regarding a State's witness's plea bargain for a reduction of charges in exchange for his testimony did not improperly allow the jury to decide why the witness testified.

**5. Criminal Law § 11— accessory after the fact to voluntary manslaughter—instructions**

A court's instruction that "for a person to be guilty of a crime in this case, accessory after the fact of voluntary manslaughter, it is not necessary that he



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**State v. Earnhardt**

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or she do all of the acts necessary to constitute the crime, but he or she must be present," accurately stated the law of concerted action.

**6. Criminal Law § 111.1— use of "they" in charge to jury**

From the court's use of the pronoun "they" in part of the charge to the jury, it was clear that the trial court was referring to the codefendants, and the instruction did not allow the jury to consider the codefendants' actions against defendant.

**7. Criminal Law § 113.8— accessory after the fact—instruction improper**

In a prosecution for accessory after the fact to voluntary manslaughter, the court erred in instructing that if defendant knew two men "*could* have committed the crime of voluntary manslaughter" and assisted these men in escaping or attempting to escape detection or arrest, then he should be found guilty since it must have been shown that defendant *knew* a felony had been committed.

Judge HEDRICK dissenting.

APPEAL by defendant from *Walker, Judge*. Judgment pronounced 19 February 1981 in Superior Court, ROWAN County. Heard in the Court of Appeals 9 December 1981.

Defendant was arraigned on a charge of accessory after the fact of voluntary manslaughter, entered a plea of not guilty, and was tried with a codefendant.

Donald Ray Lagree, testifying pursuant to a plea negotiation, testified that on the night of 29 June 1980, he and Walter Horne, who are black males, and two white women were drinking liquor at the home of defendant. Clarence Basinger, husband of one of the women, came to the front door of the house and told defendant that he wanted to speak to his wife. Linda Basinger went out to the porch but ran back into the house about fifteen minutes later holding the side of her face, crying. She said that her husband had hit her. Codefendant Vickie Earnhardt, Linda's sister, called the Sheriff's Department. Defendant went outside and talked to Clarence Basinger, then returned and said that Basinger was sorry for what he had done and that he wanted to speak to his wife again. Linda Basinger went back outside, accompanied by defendant. Those remaining inside heard a woman's scream, ran outside, and saw that Linda Basinger had been cut on the arm and was bleeding profusely. Lagree and Horne began arguing with Clarence Basinger, and a fight broke out. Basinger had an open hawkbill knife in his hand; Horne had a pocketknife, and

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**State v. Earnhardt**

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Lagree, a belt. Basinger fell to the ground and was kicked and stomped. He crawled to the road in front of the house and called from the edge of the road that he was going to return with a shotgun. Basinger was still on the ground in a crawling position. Horne then approached Basinger, and they began fighting again. Horne hit Basinger's head on the road, and Basinger was kicked and stomped. Basinger crossed to the other side of the road, where he was left lying, conscious, with his upper body on the roadway. Defendant was standing in the yard of his house during the fight and did nothing.

Horne and Lagree went back into the house. Lagree, Horne and defendant Earnhardt walked out to the road and found Basinger still conscious and moaning. Horne kicked Basinger in the head. The men discussed whether they should move Basinger out of the road, but within moments, two automobiles simultaneously approached from opposite directions and Basinger was struck by a Ford Pinto. The driver, William Beck, stopped and called an ambulance and the Sheriff's Department. Patrick Beck, Beck's younger brother, and Lagree testified that defendant told Horne, Lagree and Earnhardt not to relate everything, but to tell the following story: Clarence Basinger pulled a knife on his wife and tried to cut her, and defendant tried to wrestle the knife away; defendant saw two black men walking up the road and called to them for help; Basinger ran when he saw the men coming and fell down in the road, where he was hit by an automobile. Defendant rehearsed the story with his companions at least three times. Steve Douglas, the investigating deputy sheriff, testified that defendant told him the story when he met defendant to talk about the incident.

Defendant was convicted of being an accessory after the fact of voluntary manslaughter. He appeals from an order of imprisonment.

*Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the state.*

*Davis and Corriher, by Robert M. Davis, for defendant appellant.*

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State v. Earnhardt

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MORRIS, Chief Judge.

[1] North Carolina Appellate Rule 9(b)(3) stipulates that "the record on appeal in criminal actions shall contain: . . . (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken, (viii) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally . . ." Defendant has failed to include copies of either the verdict, judgment, notice of appeal, or appeal entry, although the information contained in those documents does appear in the Record in various places. We call appellant's attention to the requirements of the rule. The rule is a practical one. In addition to insuring that the procedures at trial are presented to the court accurately, it also results in presenting the record to the Court chronologically, without the necessity of the Court's having to search the Record for necessary components. The case is technically subject to dismissal. Because of the severity of the charges against defendant, we have elected to consider the appeal on its merits.

Defendant brings forth three assignments of error. He first contends that the trial court erred in denying his motions to dismiss at the end of the State's evidence and at the end of all the evidence, because, he says, the evidence fails to show that defendant knew Lagree had committed voluntary manslaughter.

[2] In order to prove a person to be an accessory after the fact, it must be shown (1) that the felony was committed, (2) that the accused knew the felony had been committed by the person assisted, and (3) that the accessory personally rendered assistance to the felon. *State v. Potter*, 221 N.C. 153, 19 S.E. 2d 257 (1942). *State v. Martin*, 30 N.C. App. 166, 226 S.E. 2d 682 (1976). Defendant contends that the evidence fails to show that he knew the offense had been committed, or that he even knew the victim was in the road. On the contrary, the evidence, according to defendant, shows that he thought Basinger was in the ditch on the far side of the road. We hold that there was sufficient evidence to survive defendant's motions. As the state's brief points out, it makes no difference that defendant may not have actually seen the victim in the road before the automobile struck him. Testimony indicated that defendant knew, before proposing the false story to be told the authorities, that Basinger, Horne, and Lagree were fighting, that Basinger was left very near to or on

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State v. Earnhardt

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the road, and that he had been struck and killed by an automobile. The evidence is, therefore, sufficient, when considered in the light most favorable to the state, to satisfy each element of the offense of accessory after the fact. Indeed, it shows that defendant knew a felony had been committed by Horne or Lagree before he concocted the tale, engineered cooperation among those present, and related the story to Deputy Douglas.

[3] Defendant asserts that the trial court erred in allowing the district attorney to state in his closing argument, with reference to those present at defendant's house, that "they were acting like a pack of wolves." We hold, however, that this characterization did not torture the sense of the record so as to mislead the jury or deprive defendant of a fair trial. The evidence presented showed that defendant and four other persons were drinking at defendant's house; that Clarence Basinger cut his wife; that Lagree and Horne, armed with a belt and knife, viciously beat and kicked Basinger in the presence of the others; that the fighting spilled from the front porch to the yard and into the road; and that the victim was left in the road to be struck by an automobile. This evidence supports the argument of the district attorney.

[W]hen the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by the evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument.

*State v. Westbrook*, 279 N.C. 18, 39, 181 S.E. 2d 572, 584 (1971); *sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761 (1972). Moreover, we are unable to determine from the record whether the trial judge abused his discretion in controlling the jury argument as the only portion of the district attorney's remarks set forth in the record on appeal is the sentence which is the subject of Exception No. 3A. When a portion of the argument is omitted from the record, the argument is presumed proper. *State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159 (1978).

[4] Defendant argues by his final assignment of error that the trial court erred in several instances in its charge to the jury. Defendant first asserts that the instruction regarding state's witness Lagree's plea bargain for a reduction of charges in ex-

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**State v. Earnhardt**

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change for his testimony improperly allowed the jury to decide why the witness testified. There is no merit in this contention. The instruction explicitly reminds the jurors that Lagree was an interested witness testifying in accordance with a plea bargain agreement, and warns them to "examine the testimony with great care and caution in deciding whether to believe him."

Defendant excepts to the court's instruction that a conviction of witness Lagree for voluntary manslaughter could be utilized by the jury to decide whether to believe "other testimony at this trial." Defendant contends that this instruction could have caused the jury to use the fact of conviction to decide whether to believe other witnesses. We hold that this instruction, when read with the instruction on the plea bargain, concerned only Lagree and clearly instructed that his guilty plea could only be considered as it bore on the truthfulness of his testimony.

[5] Defendant also excepts to the court's instruction that "for a person to be guilty of a crime in this case, accessory after the fact to voluntary manslaughter, it is not necessary that he or she do all of the acts necessary to constitute the crime, but he or she must be present." Defendant believes that the state must prove that he did all the acts necessary to constitute the crime. We hold that although the state must prove all the elements of the crime, there is no such requirement regarding "acts" committed by the defendant. The trial judge accurately stated the law of concerted action and properly instructed that each element must be proven. It is clear, when this instruction is read as a whole, that the court explained that it is not necessary that defendant do all the acts himself, but that he can be guilty of the crime by acting in concert with others.

[6] Defendant further excepts to the court's use of the pronoun "they" in part of the charge to the jury. Vickie Earnhardt was also on trial in this matter, and it is clear that the trial court was referring to the codefendants. Defendant argues that the instruction was improper because it allowed the jury to consider Vickie Earnhardt's actions against him and did not specify that defendant must have done the acts constituting the crime. The trial court in its charge stated several times that the jury must treat each case and each defendant separately, however. This exception is, therefore, without merit.

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[7] Defendant's sixth contention with regard to the jury instructions is that defendant must have known that Horne and Lagree had committed a felony, but that the court charged that if defendant, "knowing Horne and Lagree or Horne or Lagree *could* have committed the crime of voluntary manslaughter, assisted Horne or Lagree in escaping or attempting to escape detection, arrest or punishment . . .," then he should be found guilty. Defendant argues that it must have been shown that he *knew* a felony had been committed. We agree with this contention but hold, because the court had otherwise consistently stated that defendant must have known that homicide had been committed, that the instructions were proper when read as a whole.

Defendant's final contention concerns the court's instructions on acting in concert. The jury was charged and retired but returned with a request for further instruction on the law of concerted action. Defendant reiterates the argument that to be convicted of a crime a defendant must do all of the acts necessary to constitute the crime, but complains that the instruction again indicated that the defendant was not required to do all the acts necessary to constitute the crime, only that he must be present. However,

[i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

*State v. Joyner*, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979). The instruction was, therefore, correct.

In defendant's trial and the judgment rendered, we find

No error.

Judge MARTIN (Robert M.) concurs.

Judge HEDRICK dissents.

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State v. Earnhardt

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Judge HEDRICK dissenting.

Because of the bizarre circumstances giving rise to this case, further elaboration and clarification on several aspects of the whole matter is necessary to an understanding of this appeal and defendant's assignments of error.

The case is entitled *State v. Earnhardt and Keller* with two trial court numbers, 81CRS2038 and 81CRS2039. The record discloses that defendant Keller was indicted for the murder of Clarence Basinger, but he was arraigned on a bill of indictment charging him with accessory after the fact of voluntary manslaughter, number 81CRS2039. The record before us does not disclose what disposition was made in Earnhardt's case, but it is clear that her case is not before us on this appeal. The defendant Keller was found guilty of accessory after the fact of voluntary manslaughter and a judgment imposing a prison sentence of not more than ten nor less than four years was entered on 19 February 1981.

I dissent from the majority's holding that the trial court did not err in denying defendant's "motion to dismiss" made at the close of all the evidence. When all the evidence is considered in the light most favorable to the State, it tends to show the following:

Donald Lagree, the State's principal witness, who under a plea bargain pleaded guilty to voluntary manslaughter, and Walter Horne, black men, were drinking wine and smoking marijuana at Horne's house on the evening of 28 June 1980. Lagree had been drinking scotch and beer all day. At about 9:00 p.m., Linda Basinger and Vickie Earnhardt, white women with two small children, came to Horne's house and said they were having car trouble and requested assistance. Since it was dark, Horne and Lagree had the women's car moved to an area where it could be worked upon under a street light, and then Horne and Lagree switched some spark plug wires around and got the car "running better." As payment, Linda and Vickie bought Horne and Lagree a can of beer and a fifth of Wild Irish Rose wine. Linda then invited the group over to the house of her boyfriend, defendant Keller, to drink some liquor. It was about 11:00 p.m. when the group went to defendant's house located on Castor Road in Rowan County. After they had been drinking whiskey for one to

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two hours at defendant's house, Clarence Basinger, Linda's husband, knocked on the door. Defendant Keller answered the door and came back and told Linda that her husband wanted to talk with her. Linda went outside but came back into the house minutes later after having been slapped by her husband. Vickie picked up the phone and said she was calling the Sheriff's Department, and defendant went back outside. Defendant returned and told Linda that her husband was sorry and that he wanted to talk to her again. Linda went back outside and after a few minutes was cut on the arm by a knife wielded by her husband. Lagree and Horne went outside and were verbally threatened and abused by Basinger. A fight broke out among Lagree, Horne, and Basinger. Lagree was wielding a belt; Horne, a pocketknife; and Basinger, a hawkbill knife. The defendant observed the initial blows of this fight. Basinger was knocked to the ground and was kicked and stomped. Basinger "started crawling toward the road," and again verbally threatened Lagree and Horne. A second fight then broke out in which "Walter [Horne] dragged him and he hit his head on the road . . . [.] Walter kicked him . . . [.] [h]e crossed to the left side of the road where he went down again and he was kicked and stomped again as he laid on the road." "Just before the second fight broke out," the defendant "was standing in the yard;" the defendant "didn't do anything as this was going on." After the second fight, Lagree went back to the house. Then Horne, Lagree, and Vickie went out to the road to see how badly Basinger was hurt. Basinger was lying in the road moaning and Horne kicked him again. Minutes later, a car hit Basinger while he was still in the road. After it was realized that Basinger was dead, defendant proposed to Horne, Lagree, and Earnhardt that the entire truth about what happened not be told, but rather that they describe what happened as follows: Defendant tried to prevent Basinger from cutting his wife but was overpowered and called to Lagree and Horne, whom defendant had seen walking up the road, for help; when Basinger saw the men coming, he ran and fell down in the road where he was hit by an automobile. Defendant told this concocted story to the investigating officer when the officer talked to defendant about the incident.

"[T]here must be substantial evidence of all material elements of the crime charged to withstand the motion to dismiss." *State v. Murphy*, 49 N.C. App. 443, 444, 271 S.E. 2d 573,



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574 (1980). The essential elements of accessory after the fact of voluntary manslaughter are as follows: (1) that the principal felon had actually committed the felony of voluntary manslaughter; (2) that the accused knew that voluntary manslaughter had been committed by the principal felon; and (3) that the accused assisted the principal felon in his efforts to avoid detection, arrest, or punishment. See *State v. Overman*, 284 N.C. 335, 200 S.E. 2d 604 (1973); *State v. Williams*, 229 N.C. 348, 49 S.E. 2d 617 (1948). Assuming arguendo that the State presented evidence of elements (1) and (3), *supra*, attention must be directed to defendant's argument that there was no evidence that he knew voluntary manslaughter had been committed.

" 'Proximate cause is an element of . . . manslaughter.' *State v. Sherrill*, 28 N.C. App. 311, 313, 220 S.E. 2d 822, 824 (1976)." *State v. Holsclaw*, 42 N.C. App. 696, 699, 257 S.E. 2d 650, 652, *disc. rev. denied and appeal dismissed*, 298 N.C. 571, 261 S.E. 2d 126 (1979). For a person to be guilty of voluntary manslaughter, it is necessary that his acts "be a real cause, a cause without which the decedent's death would not have occurred." *State v. Holsclaw*, *supra* at 699, 257 S.E. 2d at 652. Hence, for the State to present the requisite evidence that defendant in the present case knew that Horne or Lagree had committed voluntary manslaughter, there would have to have been evidence that defendant knew that Horne or Lagree had committed acts without which Basinger's death would not have occurred. At the most, however, the evidence disclosed by the record tends to show that defendant's *knowledge* extended only to the following facts: (1) that Horne and Lagree fought with Basinger, (2) that Basinger somehow ended up on or near the road, and (3) that Basinger was struck and killed by an automobile. There is absolutely no evidence that defendant witnessed or would otherwise know how Basinger got in the road, much less that defendant knew that Horne or Lagree committed acts without which the death would not have occurred. There is no evidence that defendant knew that Horne or Lagree positioned Basinger onto the road, or that he knew that they assaulted Basinger while he was on or near the road. For all the evidence tends to show, defendant could just have easily believed that Basinger volitionally placed himself in the road, rather than believing that his being there owed to Lagree's or Horne's violence. The record tends to show only that when the second

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fight between decedent and Lagree and Horne started, defendant "was standing in the yard." This evidence is insufficient to satisfy the requirement that there be evidence that defendant knew that Lagree or Horne committed acts without which Basinger's death would not have occurred, and hence, was insufficient to show that defendant knew that any manslaughter had been committed by anyone.

I feel compelled to point out that the majority dismisses defendant's contention that he did not know that Horne or Lagree had committed voluntary manslaughter by stating that there was evidence that "defendant knew . . . that Basinger was left very near to or on the road," and "that defendant knew a felony had been committed." I have searched the record without success to discover such testimony; moreover, when the evidence is considered in the light most favorable to the State, it is insufficient to raise an inference of such a fact. The burden was on the State to offer evidence of every essential element of the crime charged. Obviously, the State could prove what defendant knew only by circumstantial evidence which would permit the jury to infer knowledge upon the part of defendant Keller. The State offered evidence tending to show only that defendant was present and that he witnessed the first fight between Horne, Lagree, and Basinger, at or very near his house. It was late at night and dark, and the evidence does not disclose that defendant saw or could have seen what occurred on or near the road. In my opinion, the trial judge erred in not granting defendant's timely motion to dismiss.

Aside from the trial court's error in failing to grant the motion to dismiss, the court also committed prejudicial error when it instructed the jury that it could find defendant guilty if the State satisfied the jury beyond a reasonable doubt that defendant knew that Horne or Lagree "*could* have committed the crime of voluntary manslaughter." [Emphasis added.] This erroneous instruction, considering all of the circumstances of the case, is too prejudicial to be hidden by the familiar rule that the charge must be considered contextually as a whole, for when the charge is considered contextually as a whole, the error becomes, in my opinion, much more prejudicial than when considered in isolation. In my opinion, the instruction dealing with the element of defendant's knowledge that voluntary manslaughter had been committed fails

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to satisfy the requirement that the judge must declare and explain the law arising on the evidence in the case.

In my opinion, the evidence is insufficient to show that Lagree committed voluntary manslaughter. Even though Lagree was allowed to testify that he had pleaded guilty to voluntary manslaughter, in my opinion, the trial court erred in instructing the jury that it could find defendant guilty of accessory after the fact of voluntary manslaughter if, among other things, it found that Horne or Lagree committed voluntary manslaughter. This error was compounded when the trial court failed to instruct the jury not to consider the evidence that Lagree had pleaded guilty to voluntary manslaughter in determining whether voluntary manslaughter had in fact been committed.

I vote to reverse.

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**PROBST CONSTRUCTION CO. v. NORTH CAROLINA DEPARTMENT OF  
TRANSPORTATION**

No. 8119SC604

(Filed 20 April 1982)

**1. Contracts §§ 20.2, 27.3— contract action—prevention of performance not applicable—issue for jury**

In a contract action to recover an additional amount for crushed stone used in the construction and paving of a highway for defendant on the ground that the platform scales used to weigh vehicles transporting the stone to the job site were defective and underweighed the stone and that defendant paid only for the amounts of stone shown by the defective scales, plaintiff did not prevent performance of the contract by defendant by failing to supply accurate scales so as to estop plaintiff from claiming additional compensation under the contract where the evidence showed that, while the contract required plaintiff to furnish the scales, it also required defendant to check the scales prior to use; the contract did not establish which party had the continuing responsibility to check the scales; and a representative of defendant normally checked the accuracy of the scales. Furthermore, the evidence presented at a hearing on a motion for summary judgment established a genuine issue of material fact as to how much crushed stone was actually delivered to the project by plaintiff where it tended to show that defendant paid for only 147,568 tons of stone; plaintiff estimated the amount of stone delivered as 177,334 tons by calculating an average weight per truck per day and multiplying that by the number of trucks on a given day; and defendant estimated that 170,974 tons of stone had been used by "cross-sectioning" the stockpiles of the stone.

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**2. Rules of Civil Procedure § 56— hearing on summary judgment motion—oral testimony**

The trial court did not err in allowing oral testimony to be introduced at a hearing on a motion for summary judgment.

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 21 April 1981, in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 9 February 1982.

Plaintiff instituted this action under G.S. 136-29, against the North Carolina Department of Transportation (hereinafter referred to as either DOT or defendant) to recover damages for an alleged breach of contract. In its complaint, plaintiff alleged (1) that it contracted to grade, distribute stone onto, and pave the relocated roadbed of U.S. Highway 220 in Montgomery County; (2) that it was responsible for supplying the crushed stone, referred to as aggregate base coarse (ABC), for which defendant was to pay \$5.05 per ton;<sup>1</sup> (3) that the platform scale used to weigh the vehicles transporting the stone to the job site was defective and inaccurate; and (4) that plaintiff delivered to the job site 29,463.25 tons of ABC which the scales did not reflect and for which defendant refused to pay. Additionally, plaintiff alleged that, by its calculations, it delivered to the roadbed 177,334.78 tons of ABC from the four stockpiles supervised and approved by DOT and that DOT's own estimates in "cross-sectioning" showed approximately 170,974 tons on the four stockpiles. Plaintiff, therefore, sought damages in the amount of \$148,789.41, since DOT only paid for 147,568 tons of ABC.

Defendant in its Answer denied that it relied on defective scales, that it received more ABC than that for which it paid, and that it breached the contract. Defendant admitted that it had estimated 170,974 tons of ABC, but contended that it had fully compensated plaintiff for all work performed and materials used on the project. By amendment to the Answer, defendant was later allowed to allege, as part of the contract, Section 106-7 of

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1. Later pleadings show that this aspect of plaintiff's contract was subcontracted to Lessees of B. V. Hedrick Company who, in turn, subcontracted the loading, weighing, and hauling to the road job to Contractor's Services and Supply, Inc., a subsidiary of Dickerson, Inc. The ABC for the job was placed on State owned and approved stockpiles at the quarry site.

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*Standard Specifications for Roads and Structures* (July 1972) (hereinafter *Standard Specifications*) which reads:

When material is to be paid for on a ton basis, the Contractor shall furnish platform scales and a weigh house except as otherwise provided in these specifications. The accuracy of the scales shall be one-half of one percent for all loads. The Contractor's platform scales will be checked by the Commission's Department of Materials and Tests prior to their use for weighing material on a project. . . .

Asserting that it had not waived this section of the contract and that plaintiff had had control of, and responsibility for, the scales, defendant contended that the plaintiff was barred from recovery due to its own material breach of the contract.

Defendant thereafter filed a motion for judgment on the pleadings or, in the alternative, for summary judgment. In its motion, defendant asserted that, if the scales supplied by plaintiff were inaccurate, the inaccuracy and any error resulting therefrom were due to plaintiff's failure to provide accurate scales. If this were the case, plaintiff itself had prevented performance of the contract by the defendant and was "estopped to take advantage of such act by insisting upon complete performance for some undeterminable quantity of stone."

Plaintiff responded with its own motion for summary judgment. After reviewing the pleadings, including interrogatories, affidavits, depositions, and oral testimony, the trial judge concluded that there was no genuine issue of material fact and that plaintiff was not entitled to relief under the contract. The plaintiff excepted to the judgment and appealed. The defendant submitted cross-assignments of error.

*Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by Clarence Kluttz, and Malcolm Blankenship, Jr., for plaintiff-appellant.*

*Attorney General Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for the State.*

BECTON, Judge.

**Plaintiff's Appeal**

Plaintiff assigns as error the trial court's granting of summary judgment in favor of defendant and its denial of partial sum-

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mary judgment in favor of plaintiff. Four arguments are presented. For the reasons that follow, we believe the trial court erred in not submitting the case to the jury.

[1] First, plaintiff contends that the doctrine of prevention relied upon by defendant in its motion for summary judgment was inappropriate under the facts of this case. The doctrine of prevention is that "one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance." *Harwood v. Shoe*, 141 N.C. 161, 163, 53 S.E. 616, 616 (1906). In order to excuse nonperformance, the conduct on the part of the party who allegedly prevented performance "'must be wrongful, and . . . in excess of his legal rights.'" *Goldston Brothers v. Newkirk*, 233 N.C. 428, 432, 64 S.E. 2d 424, 427 (1951), *quoting* Page on Contracts, Vol. 5, Sec. 2919, p. 5145. *See also* 6 Corbin on Contracts § 1264 (1962).

Defendant's contention, set forth in its motion for summary judgment, was that plaintiff, by failing to provide accurate weight scales, prevented defendant's performance of the contract and should, therefore, be estopped from taking advantage of its failure. From the documents considered on the motion for summary judgment, however, it appears that defendant's contention oversimplifies a more complex factual situation. When we view the evidence set forth in those documents in the light most favorable to the plaintiff, as must be done in ruling on a motion for summary judgment, *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974), we find that it tended to show that plaintiff, in accordance with the contract, provided the scales for weighing the stones for the highway project; that, under the terms of the contract, defendant had the responsibility to check the scales prior to use; that there was a representative of defendant present at the scales, signing each weight ticket; that, at about the midpoint of the project, the superintendent of hauling (who worked for Dickerson, Inc.) informed defendant's representatives that something was wrong with the scales, "because the weight had . . . [fallen] off so much;" and that the DOT representative agreed that something appeared to be wrong.

When deposed, an employee of Piedmont Scale Service stated that he examined the scales on 22 August 1978, after the project was completed, and found them broken. The scales were "under-

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weighing" the vehicles, and the heavier the true weight of the vehicle, the greater the degree of error. Although the contract between plaintiff and defendant did not establish which party had the continuing responsibility to check the scales, Dickerson's superintendent of hauling stated in his deposition that the State "has a man that comes around and checks the scales." Nowhere in defendant's motion and nowhere in the documents considered on the motion for summary judgment do we find any allegation or evidence that plaintiff caused the scales to malfunction.

After reviewing the foregoing evidence, this Court agrees with the plaintiff that the doctrine of prevention does not apply to the circumstances of this case. Again, it is not clear who, plaintiff or defendant, had the responsibility to check the accuracy of the scales. Based upon the deposition of Dickerson's superintendent of hauling, it appears that the defendant normally checked the accuracy of the scales. Under the evidence considered on defendant's motion for summary judgment, plaintiff cannot be said to have "prevented" defendant's performance under the contract, i.e., defendant's payment for the total amount of ABC delivered to the project.

Under the contract, defendant was obligated to pay for the actual tonnage of ABC delivered for the Highway 220 project. Defendant, however, paid only for the amount of ABC which showed on the allegedly defective scales. We believe that the evidence set forth at the hearing on the motions for summary judgment established a genuine issue of material fact as to how much ABC was actually delivered to the project. During the project, as the ABC was delivered to the stockpiles, plaintiff's employees had maintained records of tonnage used on the project by calculating an average weight per truck per day and multiplying that average by the number of trucks on the given day. The total figure they obtained was 177,334.25 tons. Compared with this is the estimate of 170,974 tons made by defendant in "cross-sectioning" the stockpiles. The stockpiles were under the control and supervision of defendant and were depleted at the end of the project. This evidence as well as the evidence derived from the weight tickets should have been allowed to go to the jury in order for the jury to determine the factual dispute concerning tonnage of ABC delivered. Summary judgment in favor of defendant was, therefore, improperly granted.

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Having determined that plaintiff should be allowed to present to the jury its evidence of breach of an express contract, we find that plaintiff's argument based on the theory of *quantum meruit* is inappropriate. "[*Quantum meruit* must rest in an implied contract," *Burns v. Burns*, 4 N.C. App. 426, 429, 167 S.E. 2d 82, 84 (1969), and there can be no implied contract when there is an enforceable express contract between the parties as to the same subject matter. *Elec-Trol, Inc. v. Contractors, Inc.*, 54 N.C. App. 626, 630, 284 S.E. 2d 119, 121 (1981).

Furthermore, we reject plaintiff's argument that it was entitled to summary judgment on the issue of liability. It is for the jury to determine what amount of ABC was delivered to the project. The tonnage established by using the allegedly defective scales presents a genuine issue as to whether the defendant is liable for more tonnage than that for which it has paid.

Plaintiff's final argument is that the trial court erroneously entered judgment dismissing the complaint for failure to state a claim for relief under G.S. 1A-1, Rule 12(b)(6). In view of the trial court's language and the fact that, by consideration of matters outside the pleadings, defendant's motion to dismiss was converted to a motion for summary judgment under G.S. 1A-1, Rule 56, we have difficulty reading the judgment as allowing defendant's Rule 12(b)(6) motion. To the extent that it is so interpreted, it is erroneous.

Defendant's Cross-Assignments of Error

[2] Under defendant's cross-assignments of error, it argues that the trial court erred in allowing oral testimony to be introduced into the record at the summary judgment hearing. While this Court has expressed some concern about the "overzealous use" of oral testimony in a hearing in a summary judgment motion, *Walton v. Meir*, 14 N.C. App. 183, 188-89, 188 S.E. 2d 56, 60-61, *cert. denied*, 281 N.C. 515, 189 S.E. 2d 35 (1972), the permissibility of such testimony was noted in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), on the basis of G.S. 1A-1, Rule 43(e). Consequently, we find no error in the trial court's admission of oral testimony.

In conclusion, summary judgment granted in defendant's favor is



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Reversed.

Judge HEDRICK and Judge HILL concur.

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STATE OF NORTH CAROLINA v. RODNEY L. LITTLE

No. 8118SC1097

(Filed 20 April 1982)

**1. Constitutional Law § 46; Criminal Law § 91.4— denial of motion for continuance— withdrawal of counsel**

The trial judge did not err in denying defendant's motion for a continuance in order to allow privately retained counsel time to prepare his case for trial, where (1) defendant's court-appointed attorney noted a disagreement over trial tactics, (2) defendant's mother had been in contact with a privately retained attorney "for two or three weeks," and (3) where defendant was represented ably by the public defender in his first trial, and the public defender stood by to represent him at his retrial.

**2. Criminal Law § 34.4— denial of motion to delete portion of confession proper**

The trial court did not err in denying defendant's motion to delete a portion of his confession in which he said, "I ran down the steps and ran to the probation office," since it tended to show his departure from the victim's apartment, which was a relevant fact, and its sole relevancy was not to show evidence of an independent crime.

**3. Criminal Law § 113.9— error in charge— curative instruction**

Where challenged remarks in the trial court's instructions were brought to the trial judge's attention prior to the jury's deliberation, and a curative instruction was given, it is assumed that the jurors understood and complied with such an instruction.

APPEAL by defendant from *Rousseau, Judge*. Judgments entered 5 June 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 March 1982.

Defendant was indicted for breaking or entering and assault with intent to commit rape. This is defendant's second trial upon these indictments. He was awarded a new trial by this Court in *State v. Little*, 51 N.C. App. 64, 275 S.E. 2d 249 (1981). Defendant again was convicted of both offenses and appeals from judgments of imprisonment.

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*Attorney General Edmisten, by Assistant Attorney General Lemuel W. Hinton, for the State.*

*Assistant Public Defender S. Kent Smith for defendant-appellant.*

HILL, Judge.

The State's evidence tends to show that on 21 November 1971, Gail Cotter Murphy lived in an apartment which constituted the second floor of a two-story brick house owned by Greensboro College. Miss Murphy rose late that morning and went to work as the college's assistant director of admissions without eating breakfast or showering. She returned to her apartment at approximately 12:30 p.m. to shower and eat lunch. After her shower, Miss Murphy, dressed only in a towel, saw a black male standing on the roof of the house looking inside. Miss Murphy next saw the black male, whom she identified as defendant, inside her apartment. She said, "Who are you, what do you want?" Defendant replied, "I'm looking for a book store." Miss Murphy directed defendant to the college library, and he left through the back door. As she went to put on her bathrobe, Miss Murphy testified, "I ran into this young black man with the butcher knife in his hand raised." Defendant told her, "I'll hurt you, shut up. Get those glasses off. Get back to that bed." Defendant then began pulling on Miss Murphy's towel and eventually pushed her onto a love seat in the bedroom. Miss Murphy screamed "bloody murder", and defendant jumped back, dropped the knife, and ran out of the apartment. Defendant offered no evidence.

[1] In defendant's first assignment of error, he argues that the trial judge erred in denying his motion for a continuance in order to allow the counsel of his choice to prepare his defense. On 3 June 1981, defendant's case was called for trial. The public defender, then representing defendant, informed the trial judge that defendant's mother had indicated a desire to retain private counsel. In fact, on that date, another attorney was retained to represent defendant. The record indicates that defendant's mother had been in contact with the privately retained attorney "for two or three weeks," and that the Commission on Racial Justice paid a part of the retainer fee.

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The public defender moved to withdraw from the case saying, "There has been some friction in this case between myself and [defendant] all along in terms of trial tactics, . . . I think they would be much happier with [the privately retained counsel]." The privately retained counsel moved for a continuance to prepare the case for trial. However, the trial judge stated the following:

Now, I'm not going to continue this case for you to go out and employ a lawyer. The case is set for trial the first thing in the morning. . . .

. . . .

. . . You have known over two months that you had a new trial, that you were entitled to a new trial, and I'm not going to delay the trial of the case for you to go out and employ a lawyer. Now, you can either have [the public defender] continue to represent you or if you don't want [the public defender], I will let him withdraw and I will let [the privately retained counsel] represent you and we will try it tomorrow or either you can be tried without a lawyer.

Defendant indicated that he had rather represent himself, but he advised the judge on the following morning that he had elected to proceed with the public defender.

The rule is firmly established that a motion to continue ordinarily is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to appellate review unless it is shown that the judge abused that discretion. "But when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable." *State v. Smathers*, 287 N.C. 226, 230, 214 S.E. 2d 112, 114-15 (1975).

Justice Ervin, speaking for the court in *State v. Speller*, 230 N.C. 345, 53 S.E. 2d 294, unequivocally declared: "Both the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. N.C. Const., Art. I, sec. 11; U.S. Const., Amend. XIV." The United States Supreme Court recognized this constitutional right in *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, with this language: "It is

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hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."

*State v. McFadden*, 292 N.C. 609, 611, 234 S.E. 2d 742, 744 (1977). Thus, the denial of defendant's motion in this case presents a constitutional question concerning his right to have counsel of his choice.

Our Supreme Court has recognized, however, that the right to be defended by chosen counsel is not absolute. *State v. McFadden*, *supra*. Quoting from *People v. Brady*, 275 Cal. App. 2d 984, 993, 80 Cal. Rptr. 418, 423 (1969), our Court stated that

. . . [d]ue process is not denied every defendant who is refused the right to defend himself by means of his chosen retained counsel; other factors, including the speedy disposition of criminal charges, demand recognition, particularly where defendant is inexcusably dilatory in securing legal representation. . . .

*State v. McFadden*, *supra* at 613, 234 S.E. 2d at 745. In the same vein, the Court observed, "[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." *Id.* at 616, 234 S.E. 2d at 747. We note that a disagreement over trial tactics generally does not render the assistance of counsel ineffective so as to compel the *appointment* of new counsel. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976).

Defendant *sub judice* was represented ably by the public defender in his first trial, and the public defender stood by to represent him at this trial. The case was certified to the Guilford County Superior Court from this Court two months before the start of this trial. The record shows that defendant's mother had been in contact with the private counsel two or three weeks before she was retained on the day of the trial. Thus, we find that defendant was dilatory in securing the privately retained counsel. Under these circumstances, when balancing defendant's right to have counsel of his choice with the need for speedy disposition of criminal charges and the orderly administration of the judicial process, it is clear that defendant's constitutional rights have not

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been denied. Moreover, the only apparent basis for defendant's dissatisfaction with the public defender was a disagreement over trial tactics. We do not find that defendant was prejudiced in any way by beginning the trial as scheduled with the public defender as his counsel, whom the record shows conducted the defense with preparation and skill. This assignment of error is overruled.

[2] Defendant's second argument assigns as error the trial judge's denial of his motion to delete a portion of his confession in which he said, "I ran down the steps and ran to the probation office." Defendant contends that this portion of his confession contains "prejudicial information unrelated to the offenses for which he was charged."

Although evidence of an unrelated crime is not admissible to prove defendant's guilt of the crime for which he is being tried, *State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979), "[i]f such evidence tends to prove any other relevant fact, . . . it will not be excluded merely because it also shows defendant to have been guilty of an independent crime." *State v. Cherry*, 298 N.C. 86, 109, 257 S.E. 2d 551, 565 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980). The portion of defendant's confession quoted above tends to show his departure from Miss Murphy's apartment, which is a relevant fact; thus, its sole relevancy is not to show evidence of an independent crime. *See generally State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980). This assignment of error is without merit.

[3] In his final argument, defendant contends that the trial judge erred by misstating the evidence in his charge to the jury and by failing to correct the misstatements as defendant requested. Apparently, when the judge reviewed the statements given by defendant to the police, he reversed the order of the content of the first two statements. These misstatements were noted to the trial judge, who stated the following:

[Counsel for defendant has] called to my attention the fact that when I recapitulated the evidence or the statement that the defendant gave the police officer that I probably had it in reverse order somewhere, but I tell you again, members of the jury, that you take your own recollection of it, not that of mine or that of counsel, and if I misstated some of the evidence, you be sure to be guided solely by your own

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recollection of the evidence and not what I have said or what counsel has said. You take it solely and simply from what the witness has said.

It is elementary that

any intimation or expression of opinion by the trial judge at any time during the trial which prejudices the jury against the accused is ground for a new trial. Whether the accused was deprived of a fair trial by the challenged remarks must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant.

*State v. Faircloth*, 297 N.C. 388, 392, 255 S.E. 2d 366, 369 (1979). See G.S. 15A-1222 & -1232. However, when the challenged remarks are brought to the trial judge's attention prior to the jurors' deliberations, *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981), and a curative instruction is given, it is assumed that the jurors understood and complied with such an instruction. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977).

In *State v. Brown*, 218 N.C. 415, 422, 11 S.E. 2d 321, 325 (1940),

[t]he court charged the jury: "Gentlemen of the jury, the court may be in error as to [an inadvertence of the trial judge called to his attention by defendant]; you will remember the evidence as to that, you will not take the court's recollection. Counsel may be correct in that, the court is not certain as to that, but you will rely upon your recollection as to what the evidence was as to that." If defendant wanted exactly what was said, he could have requested the court to review the evidence on that aspect. If error, it was harmless and not prejudicial.

In the present case, the misstatements were brought to the trial judge's attention in a timely manner. The judge responded thereto with a curative instruction very similar to that in *Brown*. Based upon *Brown* and the principles noted above, we find no prejudicial error in the trial judge's charge to the jury. See also *State v. Jones*, *supra*.

For these reasons, in defendant's trial, we find

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No error.

Judges WELLS and BECTON concur.

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STATE OF NORTH CAROLINA v. FREDDY MURPHY

No. 8117SC1067

(Filed 20 April 1982)

**1. Robbery § 4.3— use of deadly weapon—sufficiency of evidence**

The State's evidence was sufficient to show that defendant committed a robbery with a deadly weapon where one victim testified that she saw a weapon in defendant's right hand; the second victim on several occasions referred to the use of "a gun" by defendant; and there was evidence that defendant was seen walking toward the victim's home carrying a rifle.

**2. Criminal Law § 66.1— identity of defendant by sight—acquaintance with defendant—opportunity for observation**

A robbery victim was sufficiently acquainted with defendant and sufficiently observed her assailant to permit her to identify defendant as her assailant based on "the sound of his voice and the size and shape of him."

**3. Criminal Law § 102.6— prosecutor's jury argument—comment on defendant's objection to confession**

In an armed robbery case in which defense counsel argued to the jury that "the State has not introduced any statement or confession of the crime . . .," the district attorney's jury argument that "you don't have the statement to consider, ladies and gentlemen of the jury, because the defendant objected to it" did not constitute a gross impropriety which would require the trial court to intervene *ex mero motu*.

Judge WHICHARD dissenting.

APPEAL by defendant from *Washington, Judge*. Judgments entered 7 May 1981 in Superior Court, CASWELL County. Heard in the Court of Appeals 9 March 1982.

Defendant appeals his conviction on two counts of armed robbery. At trial the evidence tended to show that on 19 December 1980, between 7:00 and 7:30 p.m., James Sherrill and his wife were at home watching television when they heard a knock at their door. Mr. Sherrill went to the door, and because he did not see anyone immediately, he stepped about a foot outside. At that time, an individual put a gun to his stomach and told him to back

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into the house and turn off the light. The robber demanded guns and money and left with a small amount of money (\$1.45) from Mrs. Sherrill's purse, and Mr. Sherrill's wallet containing only his food stamps.

Neither of the victims saw the robber's face because it was covered with something plastic. Mrs. Sherrill testified that he was wearing "a waist Army jacket that comes down about halfway of your legs" and that a "long thing covered up with a white slip . . . was pointed straight at my husband's stomach." The robber had another weapon in his right hand that "was a sawed-off looking like gun but it was short." After the robber left, Mrs. Sherrill told her husband that she believed the robber was the defendant, Freddy Murphy.

James Price and Philmore Gillespie testified that on the evening of 19 December 1980, they had seen the defendant in the vicinity of the Sherrill home carrying what seemed like a rifle under his arm. Defendant was wearing an Army jacket.

James Price's son testified that on the evening in question he was outside shooting basketball and spoke with defendant, who was at that time carrying a .22 rifle.

Defendant's witnesses also placed defendant in the vicinity of the Sherrill home on the evening of 19 December. William Murphy, defendant's brother, testified that sometime after 7:30 p.m. he arrived at his mother's house, located close to the Sherrill home, where he saw defendant. The two left for Danville.

*Attorney General Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.*

*Ronald M. Price for defendant appellant.*

MARTIN (Harry C.), Judge.

[1] Defendant contends there was insufficient evidence that the crime was committed with a deadly weapon. Mrs. Sherrill testified that she saw a weapon in defendant's right hand. Defendant was seen walking toward the Sherrill home carrying a rifle. Mr. Sherrill testified, without objection, "that is when he [the defendant] pointed a gun in my stomach and told me to back up and I did. He told me to cut the light off and I did because the



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gun was on me at the time. He told me to sit down and I did because *the gun* was still on me." (Emphasis ours.) Defendant's contention is without merit. See *State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979); *State v. Evans*, 25 N.C. App. 459, 213 S.E. 2d 389 (1975).

[2] Defendant further contends there was insufficient evidence that he was the person who committed the crime. We disagree. Mrs. Sherrill testified that she had seen or spoken with the defendant "every day or two" from August to December and that defendant had worked for the Sherrills as a day laborer and had helped them with their tobacco. The witness observed her assailant sufficiently to permit subsequent identification based on "the sound of his voice and the size and shape of him." Her credibility and the weight given to her identification testimony was properly for the jury. Defendant fails to show that the evidence of identification was inherently incredible. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977).

[3] During his final argument to the jury, defendant's counsel stated: "I argue and contend, ladies and gentlemen of the jury, that the State has not introduced any statement or confession of the crime there to bring before you for you to consider and say this is some other evidence. I have here where the defendant admitted to doing this. . . . You don't have that evidence before you to consider."

The district attorney, in his closing argument, responded: "Okay, and you don't have the statement to consider, ladies and gentlemen of the jury, because the defendant objected to it." It is defendant's contention that the trial court erred in allowing the district attorney to argue improper matters relating to suppressed evidence and defendant's failure to testify. Defendant did not object to the state's argument, and as a general rule, such failure constitutes waiver. *State v. Coffey*, 289 N.C. 431, 222 S.E. 2d 217 (1976). Moreover, defendant's counsel himself argued the matter of the suppressed evidence and, by implication, defendant's failure to testify; and it appears from the record that the trial court had apprised the jury of the matter of suppressed evidence prior to closing arguments. We find no evidence of gross impropriety upon the record before us that would require the trial court to intervene *ex mero motu*. *State v. Britt*, 288 N.C.

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699, 220 S.E. 2d 283 (1975); *State v. Brown*, 39 N.C. App. 548, 251 S.E. 2d 706, *cert. denied*, 297 N.C. 302 (1979). The record does not support a finding of prejudicial error.

Defendant next contends that the trial court erred in commenting on defendant's failure to testify. The court's instructions were proper and in compliance with *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974). Moreover, there is nothing in the record before us to suggest that the trial court erred in stating the applicable law or in its summary of the facts.

No error.

Judge MARTIN (Robert M.) concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

I respectfully dissent from the majority's failure to find prejudicial error in the district attorney's closing argument. The pertinent facts are these:

Deputy Sheriff L. H. Hamlett testified on recall for the State that he talked with defendant the day following the robbery. Defense counsel then objected "to [defendant's] statement at this time," and the court excused the jury. On *voir dire* Hamlett testified to what defendant had told him. Defendant's statement was in the nature of an alibi and entirely exculpatory. It in no way implicated or tended to implicate him in the robbery with which he was charged.

When the jury returned, the court stated:

Members of the jury, during the course of the trial, the Court has sustained the objection to anyone saying what Freddy Murphy has said on this occasion, this is an objection to what the defendant is alleged to have said to the officer and the Court sustained what Freddy said on the 20th day of December, 1980.

Thereafter defense counsel stated in his closing argument to the jury:

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Ladies and gentlemen of the jury, the best evidence that the State of North Carolina can put before you as to the crime and its commission of it and what went on in the house is what you remember as to what Mr. and Mrs. Sherrill testified to as they were there.

I argue and contend, ladies and gentlemen of the jury, that the State has not introduced any statement or confession of the crime there to bring before you for you to consider and say this is some other evidence. I have here where the defendant admitted to doing this. This is not a hard job at all if he says that he did, but you don't have that, ladies and gentlemen. You don't have that evidence before you to consider.

The district attorney then stated in his closing argument:

The defendant said there was no statement, talking about the evidence presented by the State, there was no statement made by the defendant for you to consider. No statement by the defendant for you to consider, that is what the defendant argued to you. Well, ladies and gentlemen of the jury, you remember Mr. Hamlett going to the stand last evening about fifteen of five and I asked him about talking with the defendant, Mr. Murphy, and did he talk with him. Yes, Saturday morning or Saturday afternoon, December the 20th, a statement by the defendant.

Okay, and you don't have the statement to consider, ladies and gentlemen of the jury, because the defendant objected to it. And then the defendant wanted to argue that we have not done our job, wanted to tell you that we have not done our job and brought in a statement for you to consider by the defendant. Well, there it was if he wanted you to consider it, ladies and gentlemen of the jury. If he wanted you to consider it, all he had to do was just be quiet.

The statement by defense counsel was entirely proper. There was in fact no confession in evidence. It is inaccurate to say, as does the majority opinion, that "defendant's counsel himself argued the matter of the suppressed evidence." Defense counsel's argument related to a confession, and the suppressed evidence was not a confession.

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The statement by the district attorney, however, conveyed the inevitable impression that defendant had in fact confessed and his confession had been excluded due to some legal technicality. "The district attorney owes honesty and fervor to the State and fairness to the defendant in the performance of his duties as a prosecutor." *State v. Britt*, 288 N.C. 699, 710, 220 S.E. 2d 283, 290 (1975). (Emphasis supplied.) The argument suggesting that defendant had confessed when his excluded statement was in fact exculpatory rather than inculpatory was manifestly unfair to defendant. In light of the highly inconclusive nature of the identification evidence, the possibility that the jury convicted defendant by drawing the reasonable inference from this argument that defendant had confessed, when in fact his statement was exculpatory, is by no means remote. The likelihood of prejudice is thus considerable.

I recognize that absent objection the court may have been inadvertent to the district attorney's statement. The court has a duty, however, to see that a defendant's right to a fair trial is sustained. *Britt*, 288 N.C. at 710, 220 S.E. 2d at 290. If the impropriety here was not sufficiently "gross" to evoke *ex mero motu* corrective action, such impropriety is non-extant. The statement, especially in the context of inconclusive identification evidence, rendered defendant's trial manifestly unfair. I therefore vote for a trial *de novo*.

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ALESIA DEE INMAN BUTCHER v. NATIONWIDE LIFE INSURANCE COMPANY

No. 8117SC652

(Filed 20 April 1982)

**Insurance § 46— death resulting from altercation—no entitlement to accidental death benefits**

Where the insured died as a result of injuries sustained during an altercation with the plaintiff whereby the insured instigated a fight and, in the course of that fight, he obtained a kitchen knife with which he attacked the plaintiff and from which his death resulted, his death was not caused by accidental means under the terms of the insurance policy.

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**Butcher v. Nationwide Life Ins. Co.**

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APPEAL by defendant from *Washington, Judge*. Judgment entered 13 February 1981, in Superior Court, SURRY County. Heard in the Court of Appeals 2 March 1982.

In September 1979, plaintiff brought suit against defendant on a life insurance policy under which plaintiff's late husband, Donald Lee Butcher, had been insured. According to her complaint, the life insurance policy provided a \$10,000.00 face value, a \$10,000.00 accidental death benefit, and a decreasing term rider with a commuted value of \$22,410.00, as of 13 April 1978. On 13 April 1978, the insured died as a result of a laceration on the left subclavian artery which occurred during a scuffle with the plaintiff. The complaint alleged that the insurance premiums had been paid in full; that defendant had paid plaintiff, as beneficiary, the face value and the value of the decreasing term rider; but that the defendant had refused to pay the \$10,000.00 accidental death benefit. Plaintiff sought the \$10,000.00 plus interest from date of death.

Defendant's answer alleged that plaintiff's role in the death of the insured "was wilful, intentional, unlawful, illegal or at the very least culpably negligent" and constituted a violation of Article III of Chapter 31A of the North Carolina General Statutes. Defendant also asserted, *inter alia*, that, if the insured did not die as a result of plaintiff's misconduct, then he died as a result of his own wilful misconduct, and such death would bar any recovery by the plaintiff.

The case was tried before a jury. Through her own testimony, plaintiff offered evidence tending to show that, on the evening of 13 April 1978, at approximately 10:30, plaintiff attempted to awaken her husband, the deceased, who had fallen asleep on the couch. When awakened, the deceased followed plaintiff to the other side of the room and began hitting her on the face. Although he got on top of her, plaintiff managed to escape and run to the kitchen. The deceased followed, throwing glasses at plaintiff. Within a few minutes after plaintiff locked herself in the bathroom, the deceased jiggled the door handle and opened the door. Plaintiff's testimony continued:

... he was standing there with a knife, shaking it at me and saying, "I'll teach you, you bitch. You are not running my life." I was looking at him and said, "D. L., please put the

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knife down." But he kept shaking it at me and I reached up to get the knife and my left wrist was cut slightly. He was still shaking the knife and I reached up and grabbed hold of his arm and was trying to keep the knife away from me. I was pushing him back and we kept going back and forth, and blood just started, from where I do not know. It was all over him and me, and he was saying, "Get me to the doctor, quick." We left that room to the other room and he fell in the floor, and I helped him up. We got to the living room and from there to the kitchen and then out to the door to the van, but could not get the van doors open. We tried, and I ran back into the house to get the keys, and D. L. had gone around the van and fell right there in the driveway.

Plaintiff was also allowed to testify as to previous fights she had had with the deceased. On cross-examination, plaintiff testified that she had been convicted of fighting in public and of trespass.

The defendant's evidence consisted of a portion of the autopsy report on the deceased. The report stated that the object producing the wound appeared to have penetrated approximately twelve centimeters deep. Defendant also produced evidence by one of its agents (Beamer) that tended to show that plaintiff was aware of the life insurance policy of which she was the beneficiary. On rebuttal, plaintiff offered the testimony of an employee of the Surry County Sheriff's Department who had called the defendant's agent Beamer after the insured's death. According to this witness, agent Beamer at that time said "that it might be possible that she [plaintiff] did not know about the [insurance] coverage."

The trial court denied defendant's motions for a directed verdict made at the close of plaintiff's evidence and at the close of all the evidence. The case went to the jury and, to the following issue, it returned an affirmative response:

Did the death of Donald Lee Butcher result directly and independently of all other causes from bodily injury caused solely by external, violent and accidental means?

Defendant's motion for judgment notwithstanding the verdict was denied. From judgment awarding plaintiff the accidental death benefit plus interest, defendant appealed.

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**Butcher v. Nationwide Life Ins. Co.**

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*Faw, Folger, Sharpe & White, by W. Thomas White and T. Richard Pardue, Jr., and Folger and Folger, by Fred Folger, Jr. and H. Lee Merritt, Jr., for plaintiff-appellee.*

*Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Grover Gray Wilson and Michael L. Robinson, for defendant-appellant.*

MARTIN (Robert M.), Judge.

The Accidental Death Benefit Rider issued on the life of Donald Butcher provided \$10,000 insurance against "the death of the Insured . . . [resulting] directly and independently of all other causes from bodily injury caused solely by external, violent and accidental means." In applying the law to the uncontroverted facts of this case, we conclude that the death of the insured was not caused by accidental means and that it was not, therefore, covered by the Accidental Death Benefit Rider. Defendant's motion for a directed verdict should have been allowed.

The term "accidental means" refers to the occurrence or event which produces death and not to the death itself. *Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40 (1966). The word "accidental" describes the means of death. *Id.* "The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected . . . [T]he emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation." *Fletcher v. Trust Co.*, 220 N.C. 148, 150, 16 S.E. 2d 687, 688 (1941).

In *Scarborough v. Insurance Co.*, 244 N.C. 502, 94 S.E. 2d 558 (1956), the insured (Midgette) was killed as the result of an altercation with another man (Baldwin). The uncontradicted facts were that, while in Norfolk, Virginia, Midgette argued with a stranger, Baldwin, who was sitting on the porch of his home. Midgette, after cursing Baldwin and while in a state of anger, rushed up the steps toward Baldwin; Baldwin jumped to his feet and shoved Midgette back onto a dirt sidewalk. Midgette's head, however, struck the metal water meter which caused injuries resulting in Midgette's death ten days later. There was no question but that the insured was the aggressor. The Court stated with approval the following principle from 45 C.J.S., Insurance, § 753, p. 779:

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Where the policy insures against loss of life through accidental means, the principle seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accidental injury.

*Id.* at 505, 94 S.E. 2d at 561. The court concluded that "the character and the extent of the insured's aggression under the circumstances . . . are such as to exclude the concept of death by accidental means within the meaning of the policy." *Id.* at 506, 94 S.E. 2d at 561.

Likewise, in another case involving the insured's aggressive conduct, *Clay v. Insurance Co.*, 174 N.C. 642, 94 S.E. 289 (1917), the Supreme Court interpreted a similar "accidental means" clause in a life insurance policy to invoke the test of "whether the insured, being in the wrong, was the aggressor, under circumstances that would render homicide likely as the result of his own misconduct." *Id.* at 693, 94 S.E. at 290. The court adopted the proposition that where a person voluntarily invites another to a "'deadly encounter . . ., his death, if he sustains a mortal wound, cannot be regarded as accidental by any definition of that term which has been heretofore adopted.'" *Id.* at 693, 94 S.E. at 290, quoting from *Takiaferro v. Travelers' Protective Ass'n.*, 80 Fed. 368, 370 (1897). In *Clay*, it appeared that the insured, after announcing that he would kill his adversary, first wrongfully assaulted him with a pea pole, three or four feet long, "a deadly weapon," and then pursued the fight with a pistol. The insured was shot and killed by his adversary. The Supreme Court concluded that "[s]uch a homicide could in no sense be called accidental; but on the facts as they are now presented the death of one or both of the parties was not unlikely, and that of the insured was fully justified under the law." 174 N.C. at 694, 94 S.E. at 290. While the Court ordered a new trial, it also directed that, if the facts in evidence were as presented by the appeal, the trial court should instruct the jury to return a verdict for the defendant.

In the present case, the insured died as a result of injuries sustained during an altercation with the plaintiff. The evidence



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showed that the insured instigated the fight and that, in the course of the fight, he obtained a kitchen knife with which he attacked the plaintiff. His death resulted from a wound caused by the knife. Under North Carolina law, this was not a death by accidental means, and the beneficiary of the accidental means insurance rider was not entitled to recover thereunder.

In attempting to prevent this result, the plaintiff has argued the case of *Logan v. Insurance Co.*, 46 N.C. App. 629, 265 S.E. 2d 447, *disc. review denied*, 301 N.C. 93, --- S.E. 2d --- (1980). That case involved a life insurance policy with language different from the language we find in the policy in this case, and it is not, therefore, controlling.

The defendant's motion for a directed verdict should have been allowed. The case is reversed.

Reversed.

Judges MARTIN (Harry C.) and WHICHARD concur.

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IN THE MATTER OF: BAPTIST CHILDREN'S HOMES OF NORTH CAROLINA, INC. v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8122SC710

(Filed 20 April 1982)

**1. Master and Servant § 111.1— unemployment compensation—appellate review**

The scope of judicial review of appeals of decisions of the Employment Security Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law.

**2. Master and Servant § 100— construction of Employment Security Law—consideration of federal statute**

In interpreting the Employment Security Law, serious consideration is to be given to the construction placed upon the federal statute. However, the State has the right, through its courts, to make the final interpretation of its own legislation, and neither the ruling of the Commissioner of Internal Revenue nor that of the Employment Security Commission is conclusive.

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**3. Master and Servant § 102— employment security taxes—ordained minister working as house parent at children's home**

An ordained minister who worked as a house parent at a Baptist Children's Home was performing services "in the exercise of his ministry" within the meaning of G.S. 96-8(6)k.15(iii) and was exempt from the Employment Security Law if the Baptist Children's Home was in fact an integral agency of the Baptist State Convention.

APPEAL by plaintiff from *Kivett, Judge*. Judgment entered 16 March 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 9 March 1982.

This is an appeal from affirmation by the Superior Court of the Employment Security Commission's determination that one of plaintiff's employees was covered under the Employment Security Law and that plaintiff must pay unemployment taxes for him. The employee, Ralph H. Grow, Jr., was an ordained Baptist minister who worked as a house parent for plaintiff.

At the hearing before the Commission one of plaintiff's officers testified that plaintiff is an incorporated unit of the Baptist Convention of North Carolina under the Christian Social Services Division of the Convention. Its purpose is to provide services to homeless and dependent children and their families, including unwed mothers and their children. Plaintiff is governed by a board of trustees elected by the Baptist State Convention. Plaintiff presented as an exhibit a determination by the Internal Revenue Service that plaintiff was not responsible for federal employment taxes for Grow.

In its opinion, the Commission found the following facts: Grow had worked for plaintiff as a house parent from 2 January 1978 until 18 August 1979. On 24 August 1979 Grow filed a claim for unemployment benefits. It was then discovered that no earnings had been reported to the Commission as covered wages under Chapter 96 of the General Statutes. Although Grow was an ordained Baptist minister, ordination is not a requirement for the job of house parent. Ministerial functions were not a part of or required for the house parent position. For purposes of unemployment insurance coverage, plaintiff reports for coverage the wages of all of the house parents who are not ordained ministers. The ordained ministers are treated as self-employed, and their wages are not reported.

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Plaintiff argued to the Commission that services performed by Grow were "in the exercise of his ministry," and therefore exempt under G.S. 96-8(6)k.15(ii). The Commission held, however, that the mere ordination as minister did not transform Grow's services into those exempt under the Employment Security Law, Chapter 96 of the General Statutes. Grow was performing his duties as a house parent, which were no different from the duties of non-ordained house parents. The Commission determined that the services performed by Grow were covered by the Employment Security Law and therefore plaintiff must pay unemployment contributions for him and other employees in similar positions.

Upon appeal to the Superior Court of Davidson County, the Commission's determination was affirmed. Plaintiff appeals to this Court.

*Blackwell, Blackwell, Canady & Eller by Jack E. Thornton, Jr., for plaintiff appellant.*

*Employment Security Commission of North Carolina Attorney T. S. Whitaker by Staff Attorney V. Henry Gransee, Jr., for defendant appellee.*

CLARK, Judge.

[1] Plaintiff argues that the Superior Court erred in finding that the Commission properly applied the law to the facts and in affirming the Commission's decision. The scope of judicial review of appeals from decisions of the Employment Security Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. The reviewing court may not consider the evidence to find the facts itself. G.S. 96-15(i); *In re Enoch*, 36 N.C. App. 255, 243 S.E. 2d 388 (1978).

Chapter 96 of the General Statutes provides for the contribution in prescribed amounts by employers to the Unemployment Insurance Fund on the wages of each employee. G.S. 96-8(6)k.15(ii) excludes from employment covered under the Employment Security Law services performed "by a duly ordained, commissioned, or licensed minister of a church in the exercise of his

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ministry or by a member of a religious order in the exercise of duties required by such order; . . .”

The key to a decision on this appeal lies in the interpretation of the statutory phrase “in the exercise of his ministry.” More specifically, the question is whether the fact that an individual is an ordained minister sets him apart from others who are not ordained but are employed in the same job as the minister.

The Commission stated in its decision that:

“Although it may be true that an ordained minister is particularly well suited to perform duties as a house parent, the Home does not require that a house parent be ordained and no difference in duties as a house parent flows from the status of the house parent as an ordained minister. The Commission is not persuaded that the mere ordination of an individual as a minister transforms any type of services performed for an employer into exempt services under the Employment Security Law of North Carolina, *ipso facto*. The employee here is not acting in the ‘exercise of his ministry’ but was specifically hired to perform the function of a house parent.”

G.S. 96-8(6)k.15(ii) has not previously been interpreted by our courts. Plaintiff, however, urges us to follow the line of decisions which have interpreted similar federal unemployment compensation laws, since the North Carolina Employment Security Law is based upon federal statutes and was enacted as a part of a cooperative plan between federal and state governments. Under the plan, each state collects a state unemployment tax which it remits to the federal government. The federal government then returns the state revenues along with a federal subsidy to pay unemployment claims made by employees in the state. In order to remain eligible for the federal program, the state must comply with the standards set out in the Federal Unemployment Tax Act (26 U.S.C. § 3301 *et seq.*). *Ascension Lutheran Church v. Employment Sec.*, 501 F. Supp. 843 (W.D.N.C. 1980).

[2] Our courts have held that in interpreting the Employment Security Law serious consideration is to be given to the construction placed upon the federal statute. *Employment Security Comm. v. Freight Lines*, 248 N.C. 496, 103 S.E. 2d 829 (1958).

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However, the State has the right, through its courts, to make the final interpretation of its own legislation, and neither the ruling of the Commissioner of Internal Revenue nor that of the Employment Security Commission is conclusive. *Unemployment Compensation Comm. v. Trust Co.*, 215 N.C. 491, 2 S.E. 2d 592 (1939).

The language of G.S. 96-8(6)k.15(ii), quoted above, is identical to that of 26 U.S.C. § 3121(b)(8)(A), 26 U.S.C. § 3309(b)(2), and 26 U.S.C. § 3401(a)(9). The regulations which interpret these statutes provide that if a minister performs service for an organization operated as an integral agency of a religious organization under the authority of a church or church denomination, all service performed by the minister in the control, conduct and maintenance of the religious organization is "in the exercise of his ministry." 26 C.F.R. § 31.3121(b)(8)-1 and 26 C.F.R. § 31.3401(a)(9)-1. These terms are defined in the regulations as follows:

"Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term 'religious organization' has the same meaning and application as is given to the term for income tax purposes."

*Id.*

The Internal Revenue Service has determined that an ordained minister who is a member of the faculty of a church-related college and whose duties do not include the conduct of religious worship or the ministration of sacerdotal functions is performing services "in the exercise of his ministry." Rev. Rul. 71-7, 1971-1 C.B. 282. As set forth in that ruling, the test for determining a minister's status is whether the employer is itself a religious organization under the authority of a religious body constituting a church or church denomination or, if not, whether the employer is operated as an integral agency of such a religious organization. *Id.* at 283. The Internal Revenue Service has held that if the employer is not a religious organization or an integral

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agency of a religious organization and the minister's services are not performed pursuant to an assignment by a church, only those services in the conduct of religious worship or ministration of sacerdotal functions are "in the exercise of his ministry." *Boyer v. Commissioner*, 69 T.C. 521 (1977); Rev. Rul. 78-229, 1978-1 C.B. 305; Rev. Rul. 76-323, 1976-2 C.B. 18.

[3] Based upon the foregoing decisions which have interpreted federal statutes identical to our own, we find that if plaintiff is a religious organization or an integral agency of such organization, this State should follow the federal tax determination and find that plaintiff is exempt from payment of unemployment taxes for Mr. Grow. However, although there was uncontested evidence from which the Commission could have found as a fact that plaintiff is an integral agency of the Baptist State Convention, the Commission made no such finding, one way or the other. If there is no finding as to a material fact which is necessary for proper determination of a case, the case must be remanded to the Commission to make a proper finding. *Employment Security Comm. v. Young Men's Shop*, 32 N.C. App. 23, 231 S.E. 2d 157, *disc. rev. denied*, 292 N.C. 264, 233 S.E. 2d 396 (1977). We express our disapproval at the Commission's failure to make a finding concerning plaintiff's status as a religious agency and its subsequent attempt to support its argument on appeal by contending plaintiff cannot be exempt from payment because such an essential finding does not appear in the record.

We vacate the judgment appealed from and remand this cause to the superior court for further remand to the Commission for a determination of whether the Baptist Children's Home is in fact an integral agency of the Baptist State Convention and for proceedings consistent with this opinion.

Vacated and remanded.

Judges ARNOLD and WEBB concur.

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**State v. Rush**

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STATE OF NORTH CAROLINA v. KEVIN L. RUSH

No. 815SC1144

(Filed 20 April 1982)

**1. Burglary and Unlawful Breakings § 5.8— felonious breaking and entering and felonious larceny— sufficiency of evidence**

The State's evidence was sufficient to submit the charges of felonious breaking and entering and felonious larceny to the jury where the evidence showed that defendant and another man were seen running along the street of the victim's residence at a time approximating when the theft occurred, they both were carrying large square objects, consistent with the size of stereo speakers and tape deck, the two men were running together before they split at an intersection, and the second man ran between two houses where, less than an hour later, police recovered a tape player stolen from the victim's residence.

**2. Burglary and Unlawful Breakings § 7— failure to instruct on misdemeanor larceny proper**

In a prosecution for felonious breaking and entering and larceny, the trial judge properly failed to instruct the jury on the lesser included offense of misdemeanor larceny where the uncontradicted testimony was that the property stolen was worth between \$1,000 and \$1,300.

**3. Criminal Law § 112.4— charge on circumstantial evidence adequate**

The trial court adequately instructed the jury on the role of circumstantial evidence where it instructed the jury that the State relied on circumstantial evidence and it charged that the jury could not find defendant guilty "unless all of the circumstances, considered together exclude every reasonable possibility of innocence and point conclusively to guilt."

**4. Burglary and Unlawful Breakings § 6— felonious breaking or entering and felonious larceny—disjunctive language in charge—no error**

The court's instructions in a prosecution for felonious breaking and entering and felonious larceny were proper where the court charged the jury must find defendant broke or entered into the victim's residence with the intent to commit a felony and where the court charged that the State must prove beyond a reasonable doubt "either that the defendant" took the property "after a breaking or entering, or that the" property "was worth more than \$400."

APPEAL by defendant from *Rouse, Judge*. Judgment entered 12 February 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 6 April 1982.

Defendant was convicted of felonious breaking and entering and felonious larceny. Judgments imposing prison sentences were entered.

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The State's evidence tends to show the following. On 26 September 1980, Calvin Chadwick left his residence at 605 South Third Street, Wilmington, to go on a motorcycle trip. He informed several people of his plans, including defendant. Douglas Tann was left in charge of the house.

Around 1:30 a.m. the following day, Tann left the house. At that time all doors and windows were locked. When he returned after 3:00 a.m., he found two police officers there. The back door of the house was open, and stereo equipment was missing from the living room. The missing equipment included two Pioneer speakers, a Pioneer amplifier, a Pioneer receiver, and a reel to reel tape deck. The equipment's value was between \$1000.00 and \$1,300.00. Each missing speaker was two feet high and approximately fourteen inches wide, weighing about forty to forty-five pounds. The tape player was approximately twenty-four inches by twenty-four inches, weighing about thirty to forty pounds.

Around 3:00 a.m. the same morning, a police officer had observed two men running along South Third Street. There were no other people or cars in the area. One of the men was defendant. Both men were carrying large dark square objects. At the intersection of Third and Queen Streets, they stopped under a tree. As the officer approached the intersection in his van, the men separated. One of them ran behind a house on the corner. Defendant walked "very briskly" down Queen Street and entered an apartment. The police officer parked in front of the apartment and radioed for assistance.

A few minutes later, defendant emerged from the apartment and walked up to the officer's van. He told the officer that the speakers he had been carrying were his and came from a disco on Castle Street. The officer had asked him no questions and was unaware that defendant had been carrying stereo speakers. The officer also had no knowledge of the theft at 605 South Third Street.

When a back-up officer arrived, defendant invited the men upstairs to his apartment to see the speakers. Defendant showed them two speakers which were hooked up to other stereo equipment. The speakers were dusty and appeared to have been there "for quite awhile." Defendant told the officers not to look in the apartment's other room because a person was inside asleep.



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The officers then left defendant's apartment. They searched the area where the two men had stood together and where the second man had run. Between two houses, about forty feet from where the second man had been observed running, the officer found a reel to reel tape player. Calvin Chadwick's name was on the tape player.

Defendant offered evidence that Cynthia Williams was the owner of the speakers in the apartment on Queen Street. She had purchased the speakers at Woolco. Rex Brown testified that sometime after 10:00 p.m. on September 26th, he had seen defendant at Studio 45, a disco on Castle Street. At that time, defendant had some albums with him.

*Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.*

*Office of the Appellate Defender, by Assistant Appellate Defender Lorinzo L. Joyner, and Appellate Defender Adam Stein, for defendant appellant.*

VAUGHN, Judge.

Defendant raises several assignments of error. None of them disclose prejudicial error.

[1] Defendant argues that the court erred in denying his motion to dismiss. He contends that the State's circumstantial evidence created no more than a suspicion on him and was insufficient to submit the charges to the jury. We disagree.

On a motion to dismiss, all evidence is to be viewed in the light most favorable to the State. To survive the motion, the State need not convince the court that the evidence is sufficient to establish each element of the offense beyond a reasonable doubt. The State is required, however, to offer substantial evidence of all material elements of the offense. *State v. Parker*, 268 N.C. 258, 150 S.E. 2d 428 (1966).

"The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury."

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*State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930). It is immaterial whether the evidence is direct or circumstantial. *State v. Parker*, *supra*.

In the present case, the evidence is sufficient to find that someone broke into the Chadwick home on South Third Street and stole stereo equipment valued between \$1000.00 and \$1,300.00. The issue is whether there is competent evidence to support a finding that defendant was involved in the breaking and entering and larceny.

There is no direct evidence that defendant was in "recent possession" of any stolen property. The circumstantial evidence viewed as a whole, however, reasonably leads to the conclusion that defendant was a perpetrator of the offenses committed at 605 South Third Street.

That evidence shows that defendant and another man were seen running along the street of the Chadwick residence around 3:00 a.m., September 27th, a time approximating when the theft occurred. They were both carrying large square objects, consistent with the size of stereo speakers and tape deck. The two men were running together before they split at the intersection of Third and Queen Streets. The second man then ran between two houses. Less than an hour later, police recovered from that area a tape player stolen from the Chadwick residence.

It is reasonable to assume that the tape player was left by someone involved with the breaking and entering of the Chadwick home. Circumstantial evidence also raises the presumption that it was the second unknown man who possessed and then discarded the stolen tape player. Direct evidence links defendant to that man. *Compare with State v. Parker, supra*. From such evidence, we conclude that a jury could reasonably infer that defendant acted in concert with another in committing the offenses of felonious breaking and entering and felonious larceny. Defendant's assignment of error is overruled.

[2] Assignment of error No. 6 is that the trial court committed reversible error in failing to instruct the jury on the lesser included offense of misdemeanor larceny. A trial court is not required to submit instructions on a lesser included offense unless there is evidence from which a jury can find that the lesser included of-

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fense was committed. *State v. Summitt*, 301 N.C. 591, 273 S.E. 2d 425, *cert. denied*, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed. 2d 349 (1981). In the present cause, the uncontradicted testimony is that some person or persons broke into the Chadwick residence and stole stereo equipment worth between \$1000.00 and \$1,300.00. The evidence is such that if defendant committed any offense at all, it was a felonious larceny pursuant to a breaking or entering or a felonious larceny involving more than \$400.00 worth of property. The court committed no error in failing to instruct on the offense of misdemeanor larceny.

[3] In assignment of error No. 3, defendant argues that the trial court inadequately instructed the jury on the role of circumstantial evidence. "When the evidence relied upon to establish an element of the offense charged is circumstantial, the court must charge the jury that it must return a verdict of not guilty unless the evidence points unerringly to the defendant's guilt and excludes every other reasonable hypothesis." *State v. Hill*, 272 N.C. 439, 444, 158 S.E. 2d 329, 333 (1968); *State v. Hood*, 294 N.C. 30, 239 S.E. 2d 802 (1978). The court in the present cause instructed the jury that the State relied on circumstantial evidence. It charged that the jury could not find defendant guilty "unless all of the circumstances, considered together exclude every reasonable possibility of innocence and point conclusively to guilt." We conclude that the court adequately instructed the jury on the role of circumstantial evidence.

[4] Defendant also excepts to the court's use of disjunctive language in defining the crimes of breaking or entering and larceny. Defendant argues the charge violates the defendant's constitutional right to a unanimous jury verdict. We disagree.

The court instructed the jury that to convict defendant of felonious breaking or entering, it must find defendant broke or entered into the Chadwick residence with the intent to commit a felony therein. Defendant argues the instruction is erroneous because it does not require the jury to agree on which of the acts defendant committed. In prosecutions under G.S. 14-54(a), however, it is proper for the court to submit the charge on alternative propositions. *State v. Boyd*, 287 N.C. 131, 145, 214 S.E. 2d 14, 22 (1975). The court did not err in its instructions on felonious breaking or entering.

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Defendant makes the same argument regarding the court's instructions on felonious larceny: that the State must prove beyond a reasonable doubt "either that the Defendant Rush took the reel to reel tape player, and other stereo equipment from the building after a breaking or entering, or that the reel to reel tape player and other stereo equipment was worth more than four hundred dollars." Contrary to defendant's assertions, it was not error for the court to allow the alternative propositions to be stated together. Proof of either proposition is sufficient to find defendant guilty of felonious larceny. The jury unanimously agreed that defendant was guilty of felonious breaking or entering and felonious larceny. Defendant's assignment of error is overruled.

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

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RONALD L. PURDY v. WALTER THOMAS BROWN

No. 8118SC889

(Filed 20 April 1982)

**Costs § 3; Rules of Civil Procedure § 68— offer of judgment—express exclusion of attorney's fees from "costs then accrued"**

Defendant's offer of judgment which expressly excluded attorney's fees from the tender of "costs then accrued" was invalid as a G.S. 1A-1, Rule 68 offer of judgment and was thus ineffectual to terminate plaintiff's entitlement to any attorney's fees under G.S. 6-21.1 and expert witness fees which the court might allow in its discretion as a part of the costs of the action.

APPEAL by defendant from *Collier, Judge*. Orders entered 18 June 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 April 1982.

*Marquis D. Street for plaintiff appellee.*

*Smith, Moore, Smith, Schell & Hunter, by Robert A. Wicker, for defendant appellant.*

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WHICHARD, Judge.

Plaintiff brought this action against defendant seeking (1) \$2,514.35 for medical expenses incurred for treatment of injuries sustained in an automobile collision allegedly caused by defendant's negligence, (2) lost wages of \$381.25 per week from the time of the collision until final adjudication of the claim, (3) \$150,000 for permanent injuries and mental and physical suffering, (4) future medical expenses, (5) court costs, (6) \$150,000 in punitive damages, and (7) other and further relief deemed proper. Defendant tendered judgment, purportedly pursuant to G.S. 1A-1, Rule 68, "for the sum of \$5,001.00, together with the costs, *except any attorneys' fees*, accrued at the time the offer [was] filed." (Emphasis supplied.) The offer further stated that it "expressly exclude[d] any attorneys' fees as a part of any costs accrued."

Plaintiff did not respond to this offer. The jury returned a verdict for plaintiff in the sum of \$3,500.00. Plaintiff then moved for allowance of an attorney's fee pursuant to G.S. 6-21.1. The court found that "it does appear that the . . . case falls within the intended purpose of N.C.G.S. 6-21.1 in that the verdict is so small that if the plaintiff must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to prosecute a suit on his claim . . . ." It then allowed an attorney's fee of \$1,200.00. The court also ordered payment by defendant, as part of the costs, of expert witness fees to four medical witnesses for plaintiff.

Defendant contends that because of plaintiff's failure to respond to his offer of judgment, G.S. 1A-1, Rule 68, requires that plaintiff bear the costs from the time of the offer of judgment; and that the court thus erred in awarding an attorney's fee and expert witness fees to plaintiff as part of the costs. Because it expressly excluded attorney's fees from the tender of "costs then accrued," we hold the offer of judgment fatally defective and invalid under the rule. The awards were thus in the discretion of the court.

In any personal injury suit where the judgment for recovery of damages is \$5,000.00 or less, the presiding judge may allow a reasonable attorney's fee, as a part of the costs, to the attorney representing the litigant who obtained the judgment. G.S. 6-21.1. The judgment here was for \$3,500.00. Nothing else appearing,

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then, the court had discretion to award an attorney's fee, and had "a large measure of discretion in fixing or recommending the amount to be paid." *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E. 2d 168, 170, *cert. denied*, 288 N.C. 240, 217 S.E. 2d 664 (1975). *See also Hubbard v. Casualty Co.*, 24 N.C. App. 493, 211 S.E. 2d 544, *cert. denied*, 286 N.C. 723, 213 S.E. 2d 721 (1975); *Callicutt v. Hawkins*, 11 N.C. App. 546, 181 S.E. 2d 725 (1971).

A party defending a claim may, however, offer to allow judgment to be taken against him as specified in his offer, "with costs then accrued." G.S. 1A-1, Rule 68(a). If the offer is not timely accepted, and the judgment finally obtained is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. *Id.* Defendant here made a timely offer of judgment, purportedly pursuant to this rule, to which plaintiff did not timely respond. Nothing else appearing, then, plaintiff would not be entitled to any costs incurred after the making of the offer.

Defendant's offer, however, expressly excepted attorney's fees from his tender of costs accrued at the time the offer was filed. Counsel for defendant indicated in oral argument that he considered *Hicks v. Alberston*, 284 N.C. 236, 200 S.E. 2d 40 (1973), to authorize the exception of attorney's fees from the judgment offered. In *Hicks* defendant made an offer to allow judgment "for the sum of \$150.00 plus the costs accrued to the date of this offer." Plaintiff timely served notice of acceptance of this offer of judgment "for the sum of \$150.00 plus the costs accrued to the date of said offer to include as a portion of said costs attorney's fees to be taxed against the defendant pursuant to G.S. 6-21.1 accrued to said date in the discretion of the Court." *Id.* at 237, 200 S.E. 2d at 41. The Supreme Court stated that the attorney's fee provided for by G.S. 6-21.1 is not in addition to the court costs but "'a part of the court costs,'" and that plaintiff's language in his acceptance regarding attorney's fees thus simply "proceeded from a reasonable interpretation by the plaintiff of the defendant's offer." *Id.* at 241, 200 S.E. 2d at 43. The Court then stated: "If this was not the interpretation intended by the defendant, the misunderstanding is due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom." *Id.*

Defendant apparently relies on the sentence just quoted to support express exclusion of attorney's fees from his tender of

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costs accrued at the time of the offer. That sentence was not essential to the holding in *Hicks*, and we do not view it as authorizing the exclusion of attorney's fees from a Rule 68 offer of judgment. Nor do we find other authority in this jurisdiction dispositive of the issue.

G.S. 1A-1, Rule 68(a), was adopted almost verbatim from Rule 68 of the Federal Rules of Civil Procedure. The United States District Court for the State of Colorado has held that an offer of judgment pursuant to that rule which excluded attorney's fees then accrued was fatally defective and invalid on that account. *Scheriff v. Beck*, 452 F. Supp. 1254 (1978). The court stated: "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay." *Id.* at 1260. *See also In Re McCay*, 12 B.R. 138 (1981) (offer to pay \$500 "in full settlement of your client's claim" held not to conform to Fed. R. Civ. P. 68, adopted by Bankruptcy Rules, Rule 768, because it did not include costs accrued, which include attorney's fees in the discretion of the court, as required by the rule).

In the absence of controlling authority to the contrary, we view the *Scheriff* rule as the preferable policy. Rule 68 does not expressly authorize exclusion of attorney's fees from the tender of "costs then accrued." It requires, as part of an offer of judgment valid thereunder, tender of "costs then accrued." By statute, the presiding judge may, in a personal injury suit where the judgment is \$5,000.00 or less, allow a reasonable attorney's fee to the party obtaining the judgment, "to be taxed as a part of the court costs." G.S. 6-21.1 (Emphasis supplied.) An attorney's fee allowed in such actions is thus a part of the costs, and a fee for attorney services rendered through the time the Rule 68 offer is extended is a part of the "costs then accrued" within the intent and meaning of that phrase as used in the rule. *See Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 276 S.E. 2d 496, *disc. rev. denied*, 303 N.C. 320, 281 S.E. 2d 660 (1981). An exclusion of attorney's fees for services through the time of offer thus renders an offer in non-conformance with the requirement of the rule that the offer include "costs then accrued."

Defendant's tender of judgment exclusive of attorney's fees was therefore fatally defective and invalid as a Rule 68 offer of judgment for its failure to comport with this requirement of the

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rule. It was thus ineffectual to terminate plaintiff's entitlement to any attorney's fees and expert witness fees which the court might allow.

Defendant's contention that G.S. 6-21.1 should not apply in cases brought in the Superior Court Division seeking judgments in excess of \$5,000.00 is without merit. The amount of the judgment obtained, not the amount of the judgment sought, governs applicability of the statute. The judgment obtained here was within the range which invokes operation of the statute.

Because defendant's tender was fatally defective and invalid as a Rule 68 offer of judgment, the awarding of costs remained in the court's discretion. No abuse has been shown in the exercise of that discretion to award an attorney's fee and expert witness fees to plaintiff. The orders appealed from are therefore affirmed.

Affirmed.

Judges WEBB and WELLS concur.

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STATE OF NORTH CAROLINA v. WILLIAM LAWRENCE LAY

No. 8127SC696

(Filed 20 April 1982)

**1. Criminal Law § 149— appeal from motion to suppress—time for filing prosecutor's certificate**

The Court of Appeals had jurisdiction to hear an appeal by the State from an order granting defendant's motion to suppress where the State gave oral notice of appeal on the day judgment was entered and where the State filed the prosecutor's certificate approximately a month before the record on appeal was filed. G.S. 15A-979(c), G.S. 15A-1448(a)(1).

**2. Indictment and Warrant § 16— same warrant used for misdemeanor and felony charge—effect of quashal in misdemeanor charge on felony charge**

Where the State elected to prosecute a felony and a misdemeanor charge against defendant separately, and where the charges stemmed from a search pursuant to one search warrant, the State was not collaterally estopped from proceeding under the search warrant on the felony charge, after the District Court in the misdemeanor case ordered the same warrant quashed on defendant's motion to suppress. G.S. 15A-612(a)(1) and G.S. 15A-627(a).



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APPEAL by the State from *Kirby, Judge*. Judgment entered 13 May 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 9 December 1981.

The State appeals the grant of defendant's motion to suppress evidence obtained as a result of a search. The background of this case is as follows. On 7 August 1980, a search warrant was issued for defendant's residence, on probable cause to believe that defendant possessed illegal distillery equipment and controlled substances. The search executed that day revealed that defendant possessed one pint of non-tax-paid liquor, a misdemeanor violation of G.S. 18A-6, and 9,000 tablets of Methaqualone, a felony under G.S. 90-95(a)(1). The State elected to prosecute the charges against defendant separately, and proceeded first on the misdemeanor charge in district court. On defendant's motion to suppress, on 2 November 1980, District Judge Harris found that "[t]he search warrant does not meet the statutory requirements . . .", and ordered that the search warrant be quashed, and evidence seized pursuant to the warrant be suppressed. The prosecutor then dismissed the misdemeanor charge against defendant, and did not appeal Judge Harris' ruling.

On 20 January 1981, the State obtained indictments against defendant for possession, possession with intent to sell and deliver, and trafficking in controlled substances. In Superior Court, defendant moved to suppress evidence obtained from the 7 August search, on the ground that the State should be collaterally estopped from introducing such evidence since Judge Harris quashed the warrant and the State did not appeal his order. Judge Kirby heard the motion, and on 13 May 1981 filed an order granting defendant's motion to suppress, holding that the State was collaterally estopped from relitigating the issue of the search warrant's validity. From this order, the State appeals.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Joan H. Byers, for the State.*

*Harris, Bumgardner & Corry, by Tim L. Harris and Seth H. Langson, for defendant-appellee.*

WELLS, Judge.

Two issues are raised in this appeal: whether this Court has jurisdiction to hear the State's appeal, and whether Judge Kirby

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correctly applied the doctrine of collateral estoppel to bar the State's relitigation of the validity of the search warrant, on defendant's motion to suppress on the felony charge in Superior Court.

[1] Whether we have jurisdiction to hear this appeal is the threshold issue. The State's right to appeal derives solely from applicable statutes, which must be strictly construed. *State v. Harrell*, 279 N.C. 464, 183 S.E. 2d 638 (1971); *State v. Dobson*, 51 N.C. App. 445, 276 S.E. 2d 480 (1981). G.S. 15A-1448(a)(1) requires that notice of appeal be given within ten days after entry of judgment. This the State did, by giving oral notice of appeal on 13 May 1981, the day judgment was entered. The State did not, however, file the prosecutor's certificate required by G.S. 15A-979(c)<sup>1</sup> until 3 June 1981, a date outside the ten day period of G.S. 15A-1448(a)(1). In its recent decision in *State v. Turner*, --- N.C. --- (No. 166A81, filed 30 March 1982), our Supreme Court reversed the decision of the Court of Appeals, reported at 54 N.C. App. 631, 284 S.E. 2d 142 (1981), and held that G.S. 15A-1448(a)(1) and G.S. 15A-979(c) need not be construed together to require that the prosecutor's certificate also be filed within ten days of judgment. "We hold that the certificate envisioned by G.S. 15A-979(c) is timely filed if it is filed prior to the certification of the record on appeal to the appellate division." The prosecutor's certificate in this case having been filed on 3 June 1981, and the record on appeal having been filed 2 July 1981, we hold that the certificate required by G.S. 15A-979(c) was timely filed, and that this Court has jurisdiction to consider the State's appeal in this case. This assignment of error is therefore overruled.

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1. § 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment. (1979, c. 723.)

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[2] The determinative issue in this appeal is whether the State is collaterally estopped from proceeding under the search warrant on the felony charge, after the District Court in the misdemeanor case ordered the same warrant quashed on defendant's motion to suppress. Applying the criteria set out for application of the doctrine of collateral estoppel in *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973), defendant contends that the same issue was involved in both motions to suppress: the validity of the search warrant; that this issue was raised and actually litigated in the district court; the warrant's validity was material and relevant to the disposition in the district court; and that the outcome, or granting of defendant's suppression motion, was necessary and essential to the resulting judgment, which was a voluntary dismissal by the State of the misdemeanor charge against defendant.

Our courts have recognized the utility and equity of applying the doctrine of collateral estoppel to criminal cases where the requisite conditions have been met. *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970); see *King v. Grindstaff*, supra. Our review of this case indicates that the controlling factor here is not whether the common law doctrine of collateral estoppel applies, however, but whether such an application, under these facts, would be consistent with this state's criminal procedure statutes.

Defendant's case was calendared in District Court for the morning of 23 October 1980, at which time defendant was to be tried on the misdemeanor charge and a preliminary hearing was to be held on the three felony counts. Defendant's cases were not called until the afternoon session of court, however, and by then the State's witnesses were unavailable to testify. On defendant's motion, Judge Harris agreed to hear only defendant's motion to suppress evidence in the misdemeanor case; he further decided not to call the felony cases for preliminary hearing at that time. Judge Harris then granted defendant's motion to suppress, ordered the warrant quashed, and the State dismissed the misdemeanor charge against defendant. Defendant later appeared in District Court for preliminary hearing on the felony charges, but the State announced in open court that it would not afford defendant a preliminary hearing; instead, it would seek bills of indictment directly from the grand jury. True bills of indictment as

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to all three felonies were returned by the grand jury on 20 January 1981.

Under our criminal procedure statutes, the State has two ways in which it may bring a defendant to trial on a felony charge. Pursuant to G.S. 15A-612(a)(1), the State first may bring a probable cause hearing against defendant in District Court. If the District Court determines there is probable cause, defendant's case is bound over to Superior Court for trial. G.S. 15A-612(a)(1); G.S. 15A-627(a). If the District Court finds no probable cause, it must dismiss the charges against defendant. G.S. 15A-612(a)(3). Section (b) of that statute provides, however, that "No finding made by a judge under this section precludes the State from instituting a subsequent prosecution for the same offense." Thus, despite a finding of no probable cause made by a District Court, the State may subsequently seek an indictment on the same felony charge. G.S. 15A-627; *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320 (1972); *State v. Boltinhouse*, 49 N.C. App. 665, 272 S.E. 2d 148 (1980); see G.S. 15A-701(a1)(3). Further, the State may bypass the preliminary hearing entirely, and initially seek an indictment from the grand jury. G.S. 15A-627; *State v. McGee*, 47 N.C. App. 280, 267 S.E. 2d 67 (1980), *disc. rev. denied*, 301 N.C. 101, 273 S.E. 2d 306 (1980).

Assuming, *arguendo*, that after Judge Harris granted defendant's motion to suppress on the misdemeanor charge, he also held the preliminary hearing on the felony charges, quashed the warrant and excluded the contraband seized pursuant to it from evidence, and ruled that no probable cause existed for the felony charges, the State would not have been precluded from seeking an indictment on the felonies, and the District Court's ruling would have no legal effect whatsoever. G.S. 15A-612(b). It would be logically inconsistent to allow the ruling made by Judge Harris in the misdemeanor case to nullify statutory rights granted the State in prosecuting the felonies. We hold, therefore, that Judge Kirby erred in concluding that the State was collaterally estopped from asserting, in Superior Court, the validity of the search warrant upon which the State was relying in the felony indictments. The judgment below is

Reversed.

Judges ARNOLD and MARTIN (Harry C.) concur.

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**Brooks v. Carolina Telephone**

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GAIL M. BROOKS v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY

No. 8120SC795

(Filed 20 April 1982)

**1. Master and Servant § 9— action for termination pay—summary judgment improper**

The trial court erred in entering summary judgment for defendant employer in plaintiff's action to recover termination pay where an affidavit filed by defendant in support of its motion for summary judgment admitted plaintiff's employment in a management position and admitted that it had in effect a termination allowance applicable to management employees.

**2. Master and Servant § 9— action for overtime pay—summary judgment proper**

The trial court properly entered summary judgment for defendant employer in plaintiff's action to recover overtime pay where plaintiff admitted in her affidavit that she was not entitled to overtime pay but asserted that defendant had violated its overtime policy by giving male management employees compensatory time off for overtime.

**3. Master and Servant § 10.2— wrongful discharge—insufficiency of complaint**

Plaintiff's complaint was insufficient to state a claim for relief for wrongful discharge from her employment where plaintiff failed to allege that her employment was for a fixed term.

APPEAL by plaintiff from *Smith (Donald L.)*, Judge. Judgment entered 9 June 1981 in Civil Superior Court, MOORE County. Heard in the Court of Appeals 31 March 1982.

Plaintiff's complaint contains four counts. In her first count, plaintiff alleges that she was employed by defendant for a number of years in a supervisory position; that she was wrongfully discharged; that defendant's personnel policy for management employees provides for a termination allowance upon discharge; and that she was entitled to 30 weeks salary upon her termination.

In her second count, plaintiff alleges that defendant's personnel policy provided that no employee would be discriminated against because of sex; that male management employees were compensated for overtime work, while plaintiff was not; and that she was entitled to compensation for 60 hours overtime.

In her third count, plaintiff alleges that defendant engaged in a campaign of unfriendly acts toward her to induce her to resign, causing her mental anguish.

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**Brooks v. Carolina Telephone**

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In her fourth count, plaintiff alleges that under defendant's personnel policy, she was entitled to four weeks vacation pay upon termination.

Defendant answered admitting plaintiff's employment, alleging that plaintiff was terminated for inadequate job performance, and denying the remaining essential allegations in the complaint.

After the pleadings were joined, defendant moved for summary judgment. In support of its motion, defendant offered the affidavit of P. J. Long, Assistant Vice President of Human Resources. Mr. Long stated that he had primary responsibility for development, implementation, and interpretation of personnel practices for defendant. The remainder of Long's affidavit is, verbatim, as follows:

2. On January 30, 1980, the last day on which she was employed by the Company, Gail M. Brooks was working as a Business Office Supervisor in Fayetteville, North Carolina which was a salaried, management position. Employees occupying salaried, management positions with the Company are expected to perform the duties of their positions and are not entitled to compensatory time off or overtime pay for hours worked in excess of a forty hour week. This policy applied to Mrs. Brooks as well as all other salaried, management employees.

3. From time to time, the senior management of the Company will adopt internal working practices applicable to management employees. The adoption of such practices represents a unilateral management decision and such practices can be unilaterally amended or withdrawn by management.

4. Personnel Administration Practice, Section 0992-0002CT, Issue 5, Item 12, Termination Allowance was made applicable to management employees as a result of unilateral action by senior management. In the discretion of senior management, such practice was, and continues to be, subject to change or cancellation by unilateral decision.

Plaintiff responded with her affidavit, as follows:

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**Brooks v. Carolina Telephone**

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1. That during my employment with Carolina Telephone and Telegraph Company, I was aware of a Personnel Practice and Procedure policy for the company. Vacation pay and time off were given according to the Practice Manual and I was aware of the fact that there would be no overtime pay or compensation for management personnel. However, I believe that this particular practice was violated by the company.

2. One of the reasons that I continued in employment with the company was my understanding of the rights and entitlements that I would be receiving by continuing my employment. I believe that those rights and entitlements were assured to me by the Personnel and Practice Manual for the company.

In addition to the foregoing affidavits, the trial court considered plaintiff's verified complaint. The trial court entered summary judgment for defendant on all four of plaintiff's counts. Plaintiff has appealed from that judgment.

*Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff-appellant.*

*Tally & Tally, by John C. Tally, for defendant-appellee.*

WELLS, Judge.

[1] In count one of her complaint, plaintiff has in effect alleged that her employment contract was breached. Although plaintiff did allege that she was wrongfully discharged, the closing paragraph in this count and her prayer for relief make it clear that she is seeking to recover not for wrongful discharge, but for failure of defendant to pay compensation earned during her employment. We quote, in pertinent part, as follows:

9. That the personnel administration policy for management employees provides for a termination allowance to any employee who is dismissed or induced to resign for unadaptability or inability to perform properly the duties of the job. That the Plaintiff would be entitled to thirty (30) weeks of termination allowance due to the fact that she had been employed for in excess of fifteen (15) years.

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**Brooks v. Carolina Telephone**

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WHEREFORE, the Plaintiff prays that she have and recover of the Defendant a sum equal to thirty (30) weeks of the Plaintiff's salary as termination allowance, and that the costs of this action be taxed against the Defendant.

Pursuant to the allegation set out in her first count, plaintiff would be entitled at trial to show that her contract of employment with defendant entitled her to the termination pay she seeks to recover. Defendant's denial of plaintiff's allegations as to her entitlement to such pay puts this matter at issue. Summary judgment, pursuant to the provisions of G.S. 1A-1, Rule 56 of the Rules of Civil Procedure, may be entered only when the moving party has been able to show that there is no genuine issue as to any material fact remaining to be tried. *Easter v. Hospital*, 303 N.C. 303, 278 S.E. 2d 253 (1981); *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980); *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978); *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In its affidavit in support of its motion for summary judgment, defendant has admitted plaintiff's employment in a management position and admitted that it had in effect a termination allowance applicable to management employees. Defendant's assertion, however, that such a provision was subject to changes or cancellation simply does not address the factual issue of whether plaintiff became entitled to such an allowance during and by reason of her employment. Such an employment contract provision, recognizably cancellable at will by an employer, would nevertheless operate to protect employees within its coverage during their employment and during the effective operation of such a provision. See e.g., *Thomas v. College*, 248 N.C. 609, 104 S.E. 2d 175 (1958). Compare *Briggs v. Mills*, 251 N.C. 642, 111 S.E. 2d 841 (1960). Defendant, in support of its position, relies on the decisions of our Supreme Court in *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964); and *Howell v. Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146 (1953); and the decision of this Court in *Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 253 S.E. 2d 18 (1979), *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979). Those cases dealt with each employee's right to continued employment and did not deal with the issue of benefits or compensation earned during



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employment. Those cases are not apposite to the case now before us.

Summary judgment as to plaintiff's claim in Count One was erroneously entered and must be reversed.

[2] In her second count, plaintiff seeks compensation for overtime pay. In its affidavit, defendant asserted that management employees were not entitled to overtime pay. In her affidavit, defendant admits that she was not entitled to such pay. Her allegations that defendant violated its overtime policy by giving male employees compensatory time off for overtime does not in this case state a cause of action in plaintiff's favor. Summary judgment was properly entered as to Count Two.

[3] In her third count, plaintiff seeks to recover for mental anguish resulting from her wrongful discharge. Plaintiff has not alleged that her employment was for a fixed term. This is fatal to an action for wrongful discharge, it being settled law that employment for an indefinite term may be terminated at will by either the employer or the employee. *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976); *Still v. Lance*, supra. Summary judgment was properly entered as to Count Three.

In her fourth count, plaintiff seeks to recover vacation pay. Liberally construed, count four sets out a claim for vacation pay earned during her employment. Defendant's affidavit does not address, much less rebut such a claim. For the reasons stated in our discussion of Count One, summary judgment was erroneously entered as to Count Four.

The result is:

As to the claims for relief set out in:

Count One, reversed.

Count Two, affirmed.

Count Three, affirmed.

Count Four, reversed.

Judges HILL and BECTON concur.

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*Davidson v. Dept. of Social Services*

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CLARENCE EDWARD DAVIDSON AND CAROLYN TUGGLE DAVIDSON v.  
GASTON COUNTY DEPARTMENT OF SOCIAL SERVICES FOR THE  
ADOPTION OF MARGARET MICHELLE (DAVIDSON)

No. 8127SC803

(Filed 20 April 1982)

**1. Adoption § 2— adoption proceeding— transfer to superior court— jurisdiction of motion to open child's records**

Where the clerk of superior court transferred an adoption proceeding to the civil issue docket for trial in the superior court pursuant to G.S. 1-273, the superior court had jurisdiction under G.S. 1-276 to determine petitioners' motion that the records of respondent Department of Social Services relating to the child be opened to them in order that they might prepare for the adoption proceeding.

**2. Adoption § 2— adoption proceeding— opening of child's records to petitioners**

The trial court's findings were insufficient to support its conclusion that the best interests of a child sought to be adopted by petitioners and of the public required that records of a department of social services pertaining to the child should be partially opened to the petitioners in order for them to prepare for the adoption hearing.

APPEAL by defendant from *Burroughs, Judge*. Judgment entered 16 April 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 31 March 1982.

Petitioners are seeking to adopt Margaret Moore, who resided in their home as a foster child for two and one-half years. Respondent refuses to give petitioners the necessary consent to adopt Margaret, because she is one of four siblings whom respondent feels should be placed together. On 19 January 1981, petitioners filed a motion in the cause requesting that respondent's records on Margaret be opened to them, in order to prepare for the adoption hearing. The Clerk of Superior Court denied the motion on 30 January and transferred the case to Superior Court for trial, pursuant to G.S. 1-273. Petitioners then filed another motion on 8 April requesting access to respondent's records. Judge Burroughs heard the motion, and entered an order filed 16 April containing the following relevant findings of fact, conclusions of law, and judgment:

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**Davidson v. Dept. of Social Services**

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**FINDINGS OF FACT**

. . .

6. The information sought to be revealed is necessary for the best interest of the child and the public.

7. Only a partial release of information is necessary at this time.

**CONCLUSIONS OF LAW**

1. The Court has jurisdiction over the subject matter and the parties.

2. The information sought to be revealed is necessary for the best interest of the child and the public.

**IT IS THEREFORE, ORDERED:**

1. The D.S.S. will furnish to the Attorney for the Petitioners a copy of pages one, two, three, four, five and six of Form D.S.S. 1808, Children Serv. (DSS—CW-4)-Rev. 11-74 report on proposed adoption; Clarence Edward Davidson (adopting father), Carolyn Tuggle Davidson (adopting mother), dated December 30, 1980. Said information will be provided within ten calendar days of the date of this ORDER.

2. That the content, results, and interpretation of any and all psychological history be furnished by the D.S.S. to the Attorney for the Petitioners not less than ten calendar days prior to any hearing on the merits of this motion. Said psychological information will be furnished on Margaret Michelle Moore and her siblings.

Respondent appeals from this order.

*Frederick R. Stann, for petitioners-appellees.*

*Catherine C. Stevens, for respondent-appellant.*

WELLS, Judge.

Two issues are raised by this appeal: one, whether the Superior Court had subject-matter jurisdiction to hear petitioners' motion, and two, whether the trial court properly granted

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**Davidson v. Dept. of Social Services**

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the partial opening of respondent's adoption file on Margaret Michelle Moore.

[1] Respondent first contends that the Superior Court lacked jurisdiction to hear plaintiff's motion, arguing that adoption is by a special proceeding before the Clerk of Superior Court, G.S. 48-12, and that the Superior Court has no jurisdiction in an adoption proceeding except on appeal from the Clerk, relying on G.S. 48-26(b); *In re Custody of Simpson*, 262 N.C. 206, 136 S.E. 2d 647 (1964); *In re Daughtridge*, 25 N.C. App. 141, 212 S.E. 2d 519 (1975). While respondent's arguments do correctly reflect general legal principles, they ignore a separate procedural and jurisdictional scheme for cases initially heard before the Clerk, which is set out in Chapter 1 of the General Statutes. G.S. 1-273 provides:

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the superior court. (C.C.P., c. 115; Code, s. 256; Rev., s. 588; C.S., s. 634; 1971, c. 381, s. 12.)

G.S. 1-276 further provides:

§ 1-276. Judge determines entire controversy; may recommit.—

Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (1887, c. 276; Rev., s. 614; C.S., s. 637.)

Following a hearing on petitioners' 19 January motion, the Assistant Clerk of Superior Court denied the motion and entered an order finding facts and concluding that: "[i]ssues of fact and/or law have been raised and that such matters should properly be transferred to the civil issue docket for trial at the next ensuing term of Superior Court pursuant to G.S. 1-273." By their motion

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Davidson v. Dept. of Social Services

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dated 8 April, petitioners requested that the Superior Court judge grant them a hearing. Judge Burroughs determined that he had jurisdiction to hear the motion, and subsequently granted it. There is no evidence to indicate that the judge elected to remand the matter to the Clerk. We find that the Superior Court properly exercised jurisdiction in this matter pursuant to G.S. 1-276, and overrule respondent's assignment of error. *See Oxendine v. Dept. of Social Services*, 303 N.C. 699, 281 S.E. 2d 370 (1981).

[2] In its second assignment of error, respondent contends that Judge Burroughs' finding of fact that the information sought to be revealed is necessary for the best interest of the child and the public, is unsupported by the evidence and does not support the conclusion of law. We find merit in this contention.

In *In re Spinks*, 32 N.C. App. 422, 232 S.E. 2d 479 (1977), this court interpreted G.S. 48-26 for the first time, and held that multiple, and possibly conflicting interests should be carefully evaluated and weighed by the court in deciding whether to open adoption records. These interests include, *inter alia*, those of the child, the adoptive parents, the natural parents, and the public.

The determination as to what is in the best interest of the child or the public should be made by weighing the totality of the circumstances. As in child custody and support cases, the trial judge in this type of case is given wide discretion. Nevertheless, he is required to make sufficient findings from which it can be determined that the orders are justified and appropriate. *Ramsey v. Todd*, 25 N.C. App. 605, 214 S.E. 2d 307 (1975); *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967); *Powell v. Powell*, 25 N.C. App. 695, 214 S.E. 2d 808 (1975); *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967).

*Id.* at 428; *see also* "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," 16 Wake Forest L. Rev. 563 (1980); Survey, "Domestic Relations," 56 N.C.L. Rev. 1045 (1978); Annot., 83 A.L.R. 3d 800. We find that in this case, there were insufficient findings of fact to support the conclusion of law that it was in the best interest of the child and the public that respondent's records be opened to petitioners. For this reason, the order of the trial court must be vacated.

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Price v. Price

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Vacated and remanded.

Judges HILL and BECTON concur.

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DOROTHY J. PRICE v. ELDRIDGE C. PRICE

No. 812DC755

(Filed 20 April 1982)

**Divorce and Alimony § 29.2; Judgments § 37.4— consent judgment not res judicata to claim in later action**

A consent judgment between plaintiff and defendant which related only to alimony, child support and child custody did not constitute res judicata in a subsequent action in which plaintiff sought (1) an absolute divorce, and (2) a declaratory judgment and accounting claim whereby plaintiff's role in a cattle raising operation be looked into and plaintiff be given equal credit and ownership of the profits and assets.

APPEAL by plaintiff from *Ward, Judge*. Judgment entered 22 May 1981 in District Court, MARTIN County. Heard in the Court of Appeals 30 March 1982.

On 16 May 1980, plaintiff filed a domestic action against her husband of over thirty years. She sought custody of the minor child of the parties, support, counsel fees, a writ of possession of the homeplace and a divorce from bed and board. Plaintiff also asked that defendant be restrained from selling personal property, particularly farm animals and equipment, which she alleged that defendant was selling in order to keep money and property away from plaintiff.

Defendant filed an answer to plaintiff's complaint, plaintiff moved for pendente lite relief and on 9 July 1980, the parties entered into a consent judgment. This judgment provided that plaintiff and defendant would live separate and apart with plaintiff having sole possession of the homeplace. It also provided that plaintiff have custody of the minor child and for support for plaintiff and the minor child and for counsel fees.

On 19 February 1981 plaintiff filed an action in District Court seeking (1) an absolute divorce based upon defendant's adultery,

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**Price v. Price**

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and (2) a declaratory judgment and accounting claim whereby plaintiff's role in the cattle raising operation be looked into and plaintiff be given equal credit and ownership of the profits and assets.

The trial court granted the parties a divorce based on one year's separation. The court, however, found that the plaintiff did or should have brought forward the matter of the cattle in the earlier proceeding in which the consent judgment was entered. The trial court found that plaintiff was estopped from litigating this issue in a new trial and granted summary judgment for defendant.

*Twiford, Trimpi, Thompson & Derrick by John G. Trimpi, for the plaintiff-appellant.*

*Gurganus & Bowen by Edgar J. Gurganus, for the defendant-appellee.*

MARTIN (Robert M.), Judge.

The plaintiff asserts on appeal that the trial court erred in finding that the consent judgment of 9 July 1980 constituted *res judicata* as to the second claim of the February 1981 action which resulted in summary judgment for the defendant. We agree with plaintiff.

The general rule in North Carolina is that a "judgment on the merits is conclusive not only as to matters actually litigated and determined, but also as to all matters properly within the scope of the pleadings which could and should have been brought forward." *Painter v. Board of Education*, 288 N.C. 165, 173, 217 S.E. 2d 650, 655 (1975). The court in *Painter*, 288 N.C. at 173, 217 S.E. 2d 655 went on to quote from *Gibbs v. Higgins*, 215 N.C. 201, 204-05, 1 S.E. 2d 554, 557 (1939) saying:

"... The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties *exercising reasonable diligence*, might have brought forward at the time and determined respecting it.' [Citations omitted.]"

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**Smith v. Smith**

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The consent judgment between plaintiff and defendant related only to alimony, child support and child custody. The subject matter of this action is a business enterprise operated by plaintiff and defendant and plaintiff's interest therein. We cannot say that plaintiff should have litigated this matter in the previous domestic proceeding. Therefore, the trial court's entry of summary judgment for defendant was improper.

The order of the trial court is

Reversed.

Judges MARTIN (Harry C.) and WHICHARD concur.

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GWENDOLYN PARKS SMITH v. LONNIE SMITH

No. 8126DC814

(Filed 20 April 1982)

**Divorce and Alimony § 1— nonresident plaintiff—jurisdiction of court in county where defendant does not reside**

Where plaintiff, a resident of the state of Virginia, filed an action for absolute divorce in the district court of Mecklenburg County, and defendant resided in Rowan County, the district court in Mecklenburg had jurisdiction to try the action since defendant made no appearance and made no motion to remove the case to Rowan County. G.S. § 7A-244; G.S. § 50-8.

APPEAL by plaintiff from *Lanning, Judge*. Judgment entered 29 June 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals on 31 March 1982.

*Ronald Williams for plaintiff appellant.*

*No counsel for defendant appellee.*

HEDRICK, Judge.

Plaintiff, a resident of the state of Virginia, filed this action for absolute divorce in the district court of Mecklenburg County against the defendant, a resident of Rowan County, North Carolina. Personal service was had on and accepted by the de-



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Smith v. Smith

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fendant as provided by G.S. § 1A-1, Rule 4(j). The defendant made no appearance. The trial judge, *ex mero motu*, dismissed the "action" on the grounds that "the District Court of Mecklenburg County" lacked jurisdiction because the action was filed in Mecklenburg County by a nonresident plaintiff against a defendant who was a resident of Rowan County, North Carolina.

The district court of North Carolina "is, under the provisions of G.S. § 7A-244, a court of general jurisdiction for the trial of civil actions and proceedings for . . . divorce." *Austin v. Austin*, 12 N.C. App. 286, 293, 183 S.E. 2d 420, 426 (1971). G.S. § 50-3, which states that summons for divorce proceedings shall be returnable to the court of the county in which either plaintiff or defendant resides, and G.S. § 50-8, which states that a complainant who is a nonresident of this State shall bring any divorce action in the county of defendant's residence, are not jurisdictional, and relate only to venue. These statutory venue requirements may be waived. See *Smith v. Smith*, 226 N.C. 506, 39 S.E. 2d 391 (1946); see also *Denson v. Denson*, 255 N.C. 703, 122 S.E. 2d 507 (1961); *Nelms v. Nelms*, 250 N.C. 237, 108 S.E. 2d 529 (1959). If an action for divorce be instituted in a county in the State other than the county of proper venue, "the action may be tried therein, unless the defendant before the time of answering expires demands in writing that the trial be had in the proper county." *Smith v. Smith*, *supra* at 509, 39 S.E. 2d at 393-94.

In the present case, defendant made no appearance and obviously made no motion to remove the case to Rowan County; thus, venue was waived. The district court in Mecklenburg County had jurisdiction to try the action, and the order dismissing the action must be reversed and the cause remanded for further proceedings to the district court held in Mecklenburg County.

The cost of the appeal to this Court will be taxed against the plaintiff.

Reversed and remanded.

Chief Judge MORRIS and Judge VAUGHN concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 APRIL 1982

DIXON v. DIXON No. 814DC994	Onslow (80CVD777)	Order Vacated & Cause Remanded
HAZELWOOD v. HAZELWOOD No. 8118DC564	Guilford (77CVD1020)	Reversed & Remanded
HONEYWELL v. LINK No. 8126SC896	Mecklenburg (80CVS8213)	Appeal Dismissed
IN RE JAMISON No. 8125DC989	Catawba (78J170)	Affirmed
IN RE MOSS No. 8127DC982	Cleveland (80J19)	Dismissed
INSURANCE CO. v. PRUITT No. 8123DC764	Wilkes (81CVD37)	Affirmed
PERRY v. RICH CO. No. 811SC756	Perquimans (80CVS109)	Affirmed
POST v. POST No. 8118DC733	Guilford (80CVD6871)	Affirmed
ROWE v. ROWE No. 815DC773	Pender (81CVD2)	Affirmed
RYCKMAN v. GCC No. 8119SC975	Randolph (80CVS1027)	Affirmed
SMITH v. DICKINSON No. 8118SC858	Guilford (80CVS6798)	Affirmed
STATE v. AGNEW No. 8128SC1184	Buncombe (81CRS7221A & B)	No Error
STATE v. GRADY No. 818SC1159	Wayne (80CR15282)	No Error
STATE v. GRAHAM No. 818SC1044	Lenoir (80CRS13050)	No Error
STATE v. HOOVER No. 8121SC991	Forsyth (80CRS52192)	No Error
STATE v. JONES No. 811SC1188	Pasquotank (81CRS975)	No Error
STATE v. LOVE No. 8126SC1061	Mecklenburg (80CRS2126) (80CRS2127)	No Error

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STATE v. LUCAS  
No. 8120SC886

Moore  
(81CRS717)  
(81CRS1429)

No Error

STATE v. MATSON  
No. 814SC1136

Onslow  
(80CRS19719)

No Error

STATE v. SHACKLEFORD  
No. 813SC1149

Pitt  
(80CRS14075)

No Error

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**Simmons v. C. W. Myers Trading Post**

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Judge VAUGHN concurring in part and dissenting in part to the decision in *Simmons v. C. W. Myers Trading Post* which begins on page 549.

I agree that it was error to exclude plaintiff's testimony as to value.

I respectfully disagree and dissent from that portion of the opinion holding that defendant's alleged failure to make the repair is a violation of G.S. 25A-20, so as to trigger a treble damage claim under G.S. 25A-44(4).

The agreement does not alter the terms of any express warranty. The only warranty in the contract is, in substance, as follows. The property is leased "as is," except that defendant will make the following repairs:

"fix faucet, thermostat, bath door, 2 glass in windows, washing machine, h.w. heater, cabinet doors, floors, fix bottom refrigerator, stove needs top. broken window in front bedroom, put caps over vents in back of front bedroom."

Plaintiff alleges the repairs were not made. Defendant contends they were all made. A breach of the contract to make the repairs is not an unfair trade practice under G.S. 25A-44. Plaintiff is only entitled to recover her damages, if any, flowing from that alleged breach.

# **APPENDIX**



## **AMENDMENT TO RULES OF APPELLATE PROCEDURE**



AMENDMENT TO NORTH CAROLINA  
RULES OF APPELLATE PROCEDURE

Rule 4 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 685, is hereby amended by the addition of a new subdivision to be designated "(d)" and to read as follows:

(d) *To Which Appellate Court Addressed.* An appeal of right from a judgment of a superior court by any person who has been sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other criminal cases such appeals shall be filed in the Court of Appeals.

Adopted by the Court in Conference this 13th day of July, 1982, to become effective upon adoption. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

MITCHELL, J.  
For the Court





## **ANALYTICAL INDEX**

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## **WORD AND PHRASE INDEX**



# ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

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SEALS  
SEARCHES AND SEIZURES  
STATE

TAXATION  
TORTS  
TRESPASS  
TRIAL

UNFAIR COMPETITION  
UNIFORM COMMERCIAL CODE  
UTILITIES COMMISSION

VENDOR AND PURCHASER

WAIVER  
WITNESSES

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**ADMINISTRATIVE LAW****§ 4. Procedure and Hearings of Administrative Boards and Agencies**

A hearing conducted by the Refund Committee of UNC-Greensboro to review the asserted basis for a setoff of a student debtor's delinquent account against his income tax refund should have been recorded and an official record of the hearing should have been made. *Appeal of Willett*, 584

**ADOPTION****§ 2. Parties and Procedure Generally**

Trial court erred in ordering that the records of a department of social services pertaining to a child which petitioners sought to adopt should be partially opened to petitioners in order that they might prepare for the adoption hearing. *Davidson v. Dept. of Social Services*, 806.

**ADVERSE POSSESSION****§ 2. Hostile and Permissive Use in General**

The fact that plaintiff owners have not shown adverse use for the statutory period of twenty years does not defeat their claim if they can prove prescriptive use existed in their predecessor in title. *Rathburn v. Hawkins*, 82.

**§ 25.1. Sufficiency of Evidence**

Plaintiffs' evidence was sufficient to rebut the presumption of permissive use and to be submitted to the jury in an action to establish a prescriptive easement in a roadway across defendant's land. *Newsome v. Smith*, 419.

**AGRICULTURE****§ 12. Marketing Quotas and Cards**

Where plaintiffs signed a Record of Transfer of Allotment, they agreed to be bound by its terms and thereby to subordinate their lien on their farm to the lease of defendant, and the foreclosure sale of their farms did not extinguish defendant's lease of the allotments. *Cothran v. Evans*, 431.

**APPEAL AND ERROR****§ 6. Right to Appeal Generally**

Plaintiff could not appeal from an order finding that an attorney was not guilty of criminal contempt in a proceeding seeking to hold the attorney in contempt based upon alleged interference with a child custody order. *Patterson v. Phillips*, 454.

**§ 6.2. Finality as Bearing on Appealability**

Orders for child support entered in conjunction with orders awarding alimony pendente lite are not appealable until entry of a final order on the claim for permanent alimony. *Fliehr v. Fliehr*, 465.

**ASSAULT AND BATTERY****§ 15.5. Defense of Self, Property or Others; Instruction Required**

The trial court in a felonious assault case erred in failing to instruct that defendant, being in his own home, had no duty to retreat from an alleged attack. *S. v. Riley*, 461.

## ATTORNEYS AT LAW

### § 2. Admission to Practice

In order for an out-of-state attorney to be admitted to limited practice in the courts of this State, the requirement that the client's statement be attached to the attorney's motion cannot be met by substituting the statement of North Carolina counsel. *Holley v. Burroughs Wellcome Co.*, 337.

An out-of-state attorney's affidavit sufficiently set forth his status as a "practicing attorney" in another state. *Ibid.*

Where the trial court found that the affidavit of an out-of-state attorney did not meet statutory requirements for admission to practice for a limited purpose, the court erred in denying the attorney's application in the exercise of its discretion but should have ruled as a matter of law. *Ibid.*

## AUTOMOBILES

### § 2.4. Rights and Procedures in Proceedings to Revoke Driver's License; Proceedings Related to Drunk Driving

In a tort claim action to recover damages allegedly resulting from the negligence of an assistant clerk of court in causing the Department of Motor Vehicles erroneously to revoke plaintiff's driver's license, plaintiff was not contributorily negligent in failing to notify the clerk of court or the Department of Motor Vehicles that his license had been revoked by mistake. *Caviness v. Administrative Office of the Courts*, 542.

### § 45.3. Evidence of Conduct Subsequent to Accident

Evidence that a defendant failed to stop his automobile after being involved in a collision was some evidence of negligence. *Page v. Tao*, 488.

### § 50. Sufficiency of Evidence on Issue of Negligence

In an automobile accident action stemming from defendant's driving on an interstate highway at a speed of between eight and ten miles per hour, the trial judge erred in entering judgment n.o.v. for defendant. *Page v. Tao*, 488.

### § 88. Sufficiency of Evidence of Contributory Negligence

In an action arising from an automobile accident, the trial court properly denied defendant's motion for judgment n.o.v. on grounds plaintiff was contributorily negligent. *Page v. Tao*, 488.

### § 90. Instructions

The trial court properly failed to instruct concerning the duty of a motorist to determine that a movement can be made in safety before turning from a direct line of travel. *Page v. Tao*, 488.

### § 90.14. Erroneous Instructions on Negligence

The trial court erred in instructing that plaintiff would be contributorily negligent if "she failed to apply her brakes and slow her vehicle to stop after rounding a curve and observing a tractor." *Dixon v. Wall*, 126.

### § 95.2. Negligence of Driver Imputed to Owner-Passenger

In an action in which plaintiff sought to recover for injuries sustained when an automobile in which she was a passenger hit a bull, admissions establishing plaintiff's ownership of the automobile and third party defendant's negligence in driving it established plaintiff's contributory negligence as a matter of law. *Rhoads v. Bryant*, 635.

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**AUTOMOBILES — Continued****§ 113.1. Sufficiency of Evidence of Homicide**

Circumstantial evidence offered by the State in a prosecution for involuntary manslaughter was sufficient for the jury to find that defendant was the driver of the car which struck that of decedent. *S. v. Riddle*, 701.

**BASTARDS****§ 9. Judgment and Sentence Generally**

The trial court lacked authority to attempt to relitigate an issue of paternity since the issue had been finally determined more than three years earlier. *Durham County v. Riggsbee*, 744.

**BILLS AND NOTES****§ 20. Action on Note; Sufficiency of Evidence**

Trial court erred in entering summary judgment in favor of plaintiff in an action on a promissory note given pursuant to the liquidation of an automobile dealership. *Chrysler Credit Corp. v. Belk*, 86.

The evidence in an action on a note presented questions of fact for the jury as to whether the note was delivered subject to a condition precedent that plaintiff would "pursue every possible effort" to collect the sum due from a third party by prosecuting the third party for giving a worthless check in payment of the sum due and whether plaintiff had fulfilled such condition. *Northwestern Bank v. Moretz*, 710.

The issue of whether plaintiffs executed a written agreement to convey a 25% interest in a 158 acre tract of land in consideration of the execution of a note was not resolved by plaintiffs' delivery of a quitclaim deed to the 158 acre tract which they said they did not own. *Finger v. Carter*, 745.

**BILLS OF DISCOVERY****§ 6. Compelling Discovery in Criminal Cases; Sanctions Available**

In a prosecution for aiding and abetting the sale of cocaine, the trial court did not abuse its discretion in denying defendant's motion to dismiss or to continue his case on the ground the State had not complied with a motion for discovery. *S. v. Poplin*, 304.

**BROKERS AND FACTORS****§ 1.1. Real Estate Brokers; Nature and Essentials of Relationship**

In an action concerning a real estate commission, the trial judge did not err in failing to give instructions on the duty of a broker to inform a seller that a prospective purchaser was procured by the broker's efforts. *The Property Shop v. Mountain City Investment Co.*, 644.

**§ 6. Right to Commissions Generally**

Where plaintiffs alleged a contract to buy real estate on their own account and to share in the sales commission with defendant-broker, plaintiffs were not engaged in brokerage activities "for others" and the agreement did not violate the licensing statute. *Gower v. Strout Realty, Inc.*, 603.

### **BROKERS AND FACTORS — Continued**

In an action concerning a real estate broker's commission, the trial court properly instructed that if the jury reached the damage issue, it would have already determined that the parties had entered into an agreement for the payment of a commission of six percent of the sales price of the property. *The Property Shop v. Mountain City Investment Co.*, 644.

#### **§ 8. Licensing and Regulation**

A co-brokerage or commission sharing agreement between plaintiffs, a licensed real estate broker and agent in California, and defendant was in violation of the Real Estate License Law and invalid and unenforceable because plaintiffs were not licensed in this State. *Gower v. Strout Realty, Inc.*, 603.

### **BURGLARY AND UNLAWFUL BREAKINGS**

#### **§ 1. Definition**

The fenced-in area around a warehouse was not a building within the meaning of the breaking or entering statute. *S. v. Gamble*, 55.

#### **§ 5.1. Sufficiency of Evidence; Identification of Defendant; Fingerprints**

Evidence that defendant's fingerprint was found on an air conditioner which had been removed from the outside wall of a pawn shop during a breaking and entering was insufficient to support conviction of defendant for breaking and entering the pawn shop. *S. v. Atkins*, 728.

#### **§ 5.8. Sufficiency of Evidence of Breaking or Entering and Larceny of Residential Premises**

The State's evidence was sufficient to submit the charges of felonious breaking and entering and felonious larceny to the jury. *S. v. Rush*, 787.

#### **§ 5.9. Sufficiency of Evidence of Breaking or Entering and Larceny of Business Premises**

The State's evidence was sufficient for the jury in a prosecution for felonious breaking or entering of an oil company and felonious larceny of property therefrom. *S. v. Williams*, 204.

#### **§ 7. Instructions on Lesser Included Offenses**

In a prosecution for felonious breaking and entering and larceny, the trial judge properly failed to instruct the jury on the lesser included offense of misdemeanor larceny. *S. v. Rush*, 787.

### **CLERKS OF COURT**

#### **§ 13. Liabilities of Clerk for Loss Resulting from Failure to Perform Statutory Duty**

In a tort claim action to recover damages allegedly resulting from the negligence of an assistant clerk of court in causing the Department of Motor Vehicles erroneously to revoke plaintiff's driver's license, plaintiff was not contributorily negligent in failing to notify the clerk of court or the Department of Motor Vehicles that his license had been revoked by mistake. *Caviness v. Administrative Office of the Courts*, 542.



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**CONSPIRACY****§ 4.1. Sufficiency of Indictment**

An indictment which charged that defendant conspired with another person to obtain certain tools and equipment from a store by means of forging a signature to a purchase order was sufficient to apprise defendant of the charge of conspiracy. *S. v. Bowen*, 210.

**§ 6. Sufficiency of Evidence**

The evidence of conspiracy to sell or deliver methaqualone was sufficient for submission to the jury. *S. v. Gray*, 667.

**CONSTITUTIONAL LAW****§ 17. Personal and Civil Rights Generally**

The three-year time limitation prescribed for actions founded on "a liability created by statute, either state or federal" applies to actions under 42 U.S.C. §§ 1983 and 1985(3) to recover damages for deprivation of civil rights under color of State law and for conspiracy to deprive plaintiff of his civil rights. *Evans v. Chipps*, 232.

**§ 24.7. Service of Process and Jurisdiction of Foreign Corporations**

The third-party defendants had insufficient contacts with North Carolina to permit the courts of this State to assert in personam jurisdiction over them in an action to recover damages for the allegedly defective printing, binding and mailing of plaintiff's sales catalogs. *Kaplan School Supply v. Henry Wurst, Inc.*, 567.

**§ 26.1. Full Faith and Credit; Foreign Judgments Obtained without Jurisdiction**

In an action to enforce a judgment entered by a Virginia court, the trial court erred in entering summary judgment in favor of plaintiff where there was a genuine issue concerning the jurisdiction of the Virginia court which rendered the judgment. *Old Dominion Distributors v. Bissette*, 200.

**§ 30. Discovery**

In a homicide case, admission of testimony regarding tests done on blood stained towels was proper since defendant was aware of the existence of the paper towels and of the lab results showing that the blood thereon could have been defendant's and could not have been the victim's. *S. v. Hudson*, 172.

The trial court did not err in allowing testimony by witnesses for the State concerning statements made by defendant when the State had not disclosed contents of such statements in defendant's discovery motion. *S. v. Walker*, 237.

In a prosecution for aiding and abetting the sale of cocaine, the trial court did not abuse its discretion in denying defendant's motion to dismiss or to continue his case on the ground the State had not complied with a motion for discovery. *S. v. Poplin*, 304.

**§ 33. Ex Post Facto Laws**

Testimony by defendant's wife as to what occurred at the time of the crimes in question was not rendered incompetent by G.S. 8-57 since the testimony did not involve a confidential communication between spouses, and the retroactive application of the decision permitting such testimony did not violate constitutional ex post facto clauses. *S. v. Funderburk*, 119.

**CONSTITUTIONAL LAW — Continued****§ 46. Removal or Withdrawal of Appointed Counsel**

Defendant was not denied the effective assistance of counsel at his trial on an habitual felon charge when the court denied his request for the discharge of his court-appointed counsel and the appointment of new counsel after the jury had returned a verdict against him on a narcotics charge. *S. v. Simmons*, 34.

The trial judge did not err in denying defendant's motion to replace his court-appointed counsel. *S. v. Bowen*, 210.

Defendant was not denied the effective assistance of counsel by the trial court's refusal to permit appointed counsel to withdraw on the day of trial because counsel believed that defendant would testify and perjure himself, and the court did not abuse its discretion in reappointing counsel to prosecute defendant's appeal. *S. v. Keyes*, 75.

The trial judge did not err in denying defendant's motion for a continuance in order to allow privately retained counsel time to prepare his case for trial. *S. v. Little*, 765.

**§ 48. Effective Assistance of Counsel**

In a prosecution in which both defendants were represented by one attorney, both defendants failed to show that there was an actual conflict of interest which adversely affected the counsel's performance on behalf of either defendant. *S. v. Howard*, 41.

Defendant was not denied effective assistance of counsel because her counsel did not insist that the court rule on her motion for mistrial so that counsel could testify to impeach two of the State's witnesses. *S. v. Elam*, 590.

Defendant's constitutional right to the effective assistance of counsel was denied where one of defendant's two privately retained attorneys knew that he was under investigation for his own participation in criminal conduct involving defendant. *S. v. Loye*, 501.

**§ 50. Speedy Trial**

Where defendant claimed that he was prejudiced by an intentional three-month delay in commencing prosecution, he failed to allege or make any showing that the State delayed his indictment in order to weaken his ability to defend himself. *S. v. Brown*, 323.

**§ 67. Identity of Informants**

The State was not required to disclose the full identity of a man called "Pete" who introduced to defendant an undercover agent who allegedly purchased cocaine from defendant. *S. v. Simmons*, 34.

**§ 74. Self-Incrimination Generally**

Trial court's order compelling defendant to respond to interrogatories and requests for admissions and imposing sanctions and default judgment for his failure to do so did not violate defendant's constitutional right against compulsory self-incrimination because plaintiffs sought punitive damages for fraud and body execution. *Stone v. Martin*, 473.

**CONSUMER CREDIT****§ 1. Generally**

An agreement between the parties, entitled "Lease with Option to Purchase Trailer," constituted a consumer credit sale under North Carolina's Retail Installment Sales Act. *Simmons v. C. W. Myers Trading Post*, 549.

## CONTEMPT OF COURT

### § 8. Appeal and Review

Plaintiff could not appeal from an order finding that an attorney was not guilty of criminal contempt in a proceeding seeking to hold the attorney in contempt based upon alleged interference with a child custody order. *Patterson v. Phillips*, 454.

## CONTRACTS

### § 20.2. Conduct by Adverse Party Preventing Performance

The doctrine of prevention of performance was not applicable in an action to recover an additional amount for crushed stone used in the construction of a highway for defendant on the ground that platform scales used to weigh vehicles transporting the stone to the job site were defective and underweighed the stone. *Propst Construction Co. v. Dept. of Transportation*, 759.

### § 21.2. Breach of Building and Construction Contracts

In a contract action in which plaintiff sought to recover damages caused by a fire in a housing project, the trial court did not err in entering judgment of involuntary dismissal at the close of plaintiff's evidence. *Housing Authority v. Kirkpatrick & Associates*, 400.

## CONVICTS AND PRISONERS

### § 2. Discipline and Management

Prisoners undergoing mental health care in prison or transferred to treatment facilities operated by the Department of Human Resources are not entitled to have their mental health records provided to their attorneys. *Baugh v. Woodard*, 180.

## CORPORATIONS

### § 3.1. Dispute over Election of Officers

G.S. 55-71 may not be used by a shareholder to challenge the selection of persons who act as trustees or fiduciaries pursuant to a separate trust agreement. *Foreman v. Bell*, 625.

## COSTS

### § 3. Taxing of Costs in Discretion of Court

Defendant's offer of judgment which expressly excluded attorney's fees from the tender of "costs then accrued" was invalid as a Rule 68 offer of judgment and was ineffectual to terminate plaintiff's entitlement to attorney's fees and expert witness fees which the court might allow in its discretion. *Purdy v. Brown*, 792.

### § 4.1. Witness Fees

It was error for the trial court to tax an expert witness fee as part of the costs when the expert had not testified pursuant to a subpoena. *Craven v. Chambers*, 151.

## COURTS

### § 6. Jurisdiction on Appeals from Clerk

The superior court had no jurisdiction to review an order of the clerk denying a request for a foreclosure sale where petitioners failed to give notice of appeal in apt time. *Mechanic Construction Co. v. Haywood*, 464.

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**COURTS — Continued****§ 21.5. Conflict of Laws; Tort Actions**

The right of one tort-feasor to obtain contribution from another tort-feasor is a substantive right which is governed by the law of the place of the tort. *Great West Casualty Co. v. Fletcher*, 247.

Plaintiff's action to recover damages for injuries sustained at a beach cottage rented from defendants in South Carolina on the basis of negligence and breach of implied warranty was governed by the law of South Carolina. *Williams v. Riley*, 427.

**CRIME AGAINST NATURE****§ 1. Elements of the Offense**

The threat of serious bodily harm which reasonably induces fear thereof constitutes sufficient force for a second degree sexual offense. *S. v. Berkley*, 163.

**§ 2. Indictment**

An indictment was sufficient to charge first degree sexual offense although it failed to allege particular elements that distinguish first degree and second degree sexual offenses. *S. v. Berkley*, 163.

**§ 3. Evidence and Trial**

Evidence was sufficient to support defendant's conviction of second degree sexual offense. *S. v. Berkley*, 163.

**§ 4. Instructions; Lesser Included Offenses**

Trial court's reference to threats "to perform any other foreseeable act" upon the victim constituted harmless error in a prosecution for second degree sexual offense. *S. v. Berkley*, 163.

Any error in the court's submission of crime against nature as a lesser included offense of first and second degree sexual offense was not prejudicial to defendant where the jury convicted defendant of second degree sexual offense. *Ibid*.

**CRIMINAL LAW****§ 7. Entrapment**

In a prosecution for receiving stolen goods, defendant's motions to dismiss and to set aside the verdict on grounds of entrapment were properly denied. *S. v. Hageman*, 274.

**§ 7.1. Entrapment; Illustrative Cases**

The State's evidence did not show entrapment as a matter of law in defendant's purchase of marijuana and amphetamines for an undercover agent with money given to her by the agent. *S. v. Pevia*, 384.

**§ 9.1. Aiding and Abetting; Presence at Scene**

There was sufficient evidence to support defendant's conviction of aiding and abetting in the sale of cocaine. *S. v. Poplin*, 304.

**§ 11. Accessories After the Fact**

The evidence was sufficient to survive defendant's motion to dismiss the charge of accessory after the fact of voluntary manslaughter. *S. v. Earnhardt*, 748.

A court's instruction accurately stated the law of concerted action. *Ibid*.

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**CRIMINAL LAW — Continued****§ 16.1. Concurrent and Exclusive Jurisdiction; Superior and District Courts**

Solicitation to commit perjury is an "infamous offense" which is a felony within the original jurisdiction of the superior court. *S. v. Huff*, 721.

**§ 21. Preliminary Proceedings**

The trial court had authority to retain money seized from defendant's premises pursuant to a valid search warrant even though the trial judge entered a finding of no probable cause at defendant's probable cause hearing. *S. v. Thompson*, 439.

**§ 29. Mental Capacity to Plead or Stand Trial**

Where a trial judge entered an order finding defendant "may be incapable of proceeding in this case," the court had an obligation to inquire again into the defendant's mental capacity to proceed to trial through a further hearing. *S. v. McGee*, 614.

**§ 33. Facts in Issue and Relevant to Issues in General**

In a homicide prosecution where the defendant alleged self-defense, the trial court erred in failing to allow defendant, on redirect examination, to explain the circumstances that led him to carry a gun on the night he shot decedent. *S. v. Erby*, 358.

Defendant failed to show prejudice in the admission of evidence of other undercover operations conducted by an agent during and immediately after a drug transaction with the defendant. *S. v. Gray*, 667.

**§ 33.2. Evidence as to Motive**

Cross-examination of defendant about the price of drugs and source of money he used to buy them was competent to show defendant's motive in committing burglary and larceny. *S. v. Romero*, 48.

**§ 34.4. Admissibility of Evidence of Other Offenses**

The trial court did not err in denying defendant's motion to delete a portion of his confession since it tended to show his departure from the victim's apartment. *S. v. Little*, 765.

**§ 34.6. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent Generally**

Evidence that defendant had knowledge that other items were stolen was admissible as evidence that she also had knowledge that the items for which she was charged were stolen. *S. v. Howard*, 41.

**§ 34.7. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent; Animus, Motive, Premeditation or Deliberation**

In a prosecution for conspiracy to sell and deliver LSD, an undercover officer's testimony that defendant asked him if he also wanted to purchase marijuana and exhibited to him a room where several persons were cutting marijuana was competent to prove knowledge, intent and connected crimes. *S. v. Russell*, 374.

**§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Plan or Scheme**

In a prosecution for armed robbery, evidence of defendant's previous involvement in unspecified armed robberies tended to establish a common plan or scheme to use a weapon during the commission of robbery for the purpose of obtaining money and was properly admissible. *S. v. Surgeon*, 632.

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**CRIMINAL LAW — Continued**

Where a recording concerning a sexual offense, other than the offense for which the defendant was charged, was played for the jury, the court properly instructed that the State was offering the evidence solely for the purpose of showing that there existed in defendant's mind a common scheme, plan or design to commit the crime for which he was charged. *S. v. Jarvis*, 678.

**§ 42.2. Sufficiency of Foundation for Admission of Articles and Clothing Connected with the Crime**

A pistol, an army jacket and currency found by an officer in defendant's car were properly admitted into evidence at a robbery trial even though there was no direct evidence that those articles were the ones possessed or taken by the perpetrator. *S. v. Taylor*, 113.

**§ 42.4. Articles Connected with Crime; Identification of Object and Connection with Crime; Weapons**

The State sufficiently established the chain of custody of a rifle between the time of an alleged murder and when it was turned over to the State by defense counsel three days later. *S. v. Jones*, 259.

**§ 42.6. Articles Connected with Crime; Chain of Custody or Possession**

In a prosecution for felonious possession of stolen goods, a witness's identification of a diamond was proper without establishing a chain of custody. *S. v. Andrews*, 91.

Evidence was sufficient to prove an unbroken chain of custody. *S. v. Poplin*, 304.

**§ 50.1. Admissibility of Expert Opinion Testimony**

The trial court did not err in allowing a pathologist to testify that fragments found in decedent's body were "small shot that would be the type, a shotgun shell." *S. v. Walker*, 237.

**§ 51.1. Qualification of Expert; Sufficiency of Showing**

There was sufficient evidence for the court to find a witness was an expert in chemical analysis. *S. v. Poplin*, 304.

**§ 52. Examination of Experts; Hypothetical Questions**

A firearms identification expert could properly give testimony comparing the velocities and characteristics of weapons and ammunition without the use of a hypothetical question. *S. v. Jones*, 259.

**§ 57. Evidence in Regard to Firearms**

A proper foundation was laid for opinion testimony by an expert in the field of firearms that bullet fragments removed from a murder victim's head were fired from a pistol taken from defendant. *S. v. Dowless*, 578.

**§ 60.5. Sufficiency of Fingerprint Evidence**

Evidence that defendant's fingerprint was found on an air conditioner which had been removed from the outside wall of a pawn shop during a breaking and entering was insufficient to support conviction of defendant for breaking and entering the pawn shop. *S. v. Atkins*, 728.

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**CRIMINAL LAW — Continued****§ 66.1. Evidence of Identity by Sight; Competency of Witness; Opportunity for Observation**

A robbery victim was sufficiently acquainted with defendant and sufficiently observed her assailant to permit her to identify defendant as her assailant based on "the sound of his voice and the size and shape of him." *S. v. Murphy*, 771.

**§ 66.5. Right to Counsel at Lineup Identification**

Defendant had no right to counsel when he was brought to a convenience store for identification by a store employee some 30 minutes after the employee had been robbed. *S. v. Keyes*, 75.

**§ 66.6. Suggestiveness of Lineup**

A pretrial identification procedure at which defendant was identified by an employee of a convenience store while defendant was sitting in a patrol car outside the store was not so unduly suggestive as to offend due process. *S. v. Keyes*, 75.

**§ 66.9. Suggestiveness of Photographic Identification Procedure**

The trial court did not err in its conclusions that a pretrial photographic identification procedure was not unnecessarily suggestive or conducive to mistaken identification, and that an in-court identification of defendant was of independent origin. *S. v. Brown*, 323.

**§ 69. Telephone Conversations**

A witness's identification of the defendant as the person to whom he spoke by telephone was properly admitted. *S. v. Poplin*, 304.

**§ 70. Tape Recordings**

The trial judge properly listened to a recording, allegedly made while the prosecuting witness's adoptive father made advances to her, prior to ruling on its admissibility. *S. v. Jarvis*, 678.

**§ 73. Hearsay Testimony in General**

The trial court did not err in allowing an agent to testify as to conversations and acts he had with a co-conspirator of defendant. *S. v. Gray*, 667.

Testimony as to how an agent learned that he would receive drugs and testimony as to what the agent actually paid defendant was properly admissible. *Ibid.*

**§ 75. Admissibility in General**

Where all the evidence presented at a voir dire hearing on a motion to suppress statements made by defendant to an officer indicated that the statements were made freely and voluntarily and with the full understanding of defendant's rights, the trial court properly admitted the statements. *S. v. Hudson*, 172.

The State need not prove beyond a reasonable doubt that an incriminating in-custody statement was made freely and voluntarily. *S. v. Romero*, 48.

**§ 75.4. Confessions Obtained in Absence of Counsel**

Defendant's due process rights were not violated because an officer interrogated him about a burglary charge in Greene County without the presence of an attorney who was representing him on breaking and entering charges in Johnston County. *S. v. Romero*, 48.

## CRIMINAL LAW — Continued

**§ 75.11. Confession; Sufficiency of Waiver of Constitutional Rights**

Even if defendant initially invoked his right to counsel before interrogation, defendant subsequently waived counsel by informing the officer that he would respond to those questions which he desired to answer. *S. v. Dowless*, 578.

**§ 77.3. Admissions and Declarations of or Implicating Codefendants**

Admission of a statement by a nontestifying codefendant "that she had a good idea that the items were stolen" did not violate the *Bruton* rule. *S. v. Howard*, 41.

The State was not required to make the election provided by G.S. 15A-927(c)(1) because a codefendant made an out-of-court statement implicating defendant where the codefendant testified at the joint trial and was subject to cross-examination by defendant. *S. v. Whilhite*, 395.

**§ 79. Acts and Declarations of Coconspirators**

The statements and actions of defendant's daughter in furtherance of a conspiracy to sell LSD were properly admitted into evidence against the defendant. *S. v. Russell*, 374.

**§ 83. Competency of One Spouse to Testify For or Against the Other**

Even if an officer's testimony as to what defendant's wife told him about defendant's conduct on the day in question concerned confidential communications between husband and wife, the admission of such testimony was not prejudicial error. *S. v. Jackson*, 607.

**§ 83.1. Actions in Which One Spouse May Testify Against the Other**

Testimony by defendant's wife as to what occurred at the time of the crimes in question was not rendered incompetent by G.S. 8-57 since the testimony did not involve a confidential communication between spouses, and the retroactive application of the decision permitting such testimony did not violate constitutional ex post facto clauses. *S. v. Funderburk*, 119.

**§ 85. Character Evidence Relating to Defendant**

There was no prejudicial error in the court's exclusion of character and reputation testimony by a witness. *S. v. Elam*, 590.

**§ 85.1. Character Evidence; What Questions and Evidence Are Admissible**

A character witness could testify that she had heard nothing negative about defendant. *S. v. Floyd*, 459.

**§ 85.2. Character Evidence; State's Evidence**

Any error in the admission of evidence tending to impeach defendant's character when he had not put his character in issue was cured by the trial court's instructions. *S. v. Romero*, 48.

**§ 86.3. Impeachment of Defendant; Prior Convictions; Further Cross-Examination of Defendant**

In a prosecution for breaking and entering in which defendant testified on cross-examination that he had been convicted of stealing a police radio from a police station, the trial court erred in permitting the State to further cross-examine defendant as to the details of the theft and his subsequent use of the radio to harass the police. *S. v. Bryant*, 734.



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CRIMINAL LAW — Continued**§ 86.6. Impeachment of Defendant; Prior Statements of Defendant**

The trial court erred in sustaining objections to corroborating testimony of a defense witness who had heard defendant talk to his mother-in-law over the telephone at the police station. *S. v. Erby*, 358.

**§ 87. Direct Examination of Witnesses Generally**

The trial court did not err in allowing the State to ask the prosecuting witness, who was thirteen at the time, whether she had heard a tape recording in the prosecutor's office after the witness had already testified that she had not heard the recording since making it. *S. v. Jarvis*, 678.

**§ 89. Credibility of Witnesses**

The trial court did not abuse its discretion in appointing a relative of a robbery victim to interpret the victim's testimony. *S. v. McLellan*, 101.

**§ 89.2. Corroboration of Witnesses**

In a homicide case in which one of the victim's grandchildren stated she had seen defendant and the victim arguing at a time when a western movie was on TV, it was not prejudicial error to allow an officer to testify that he "set up an appointment with Channel 18 to view a western movie." *S. v. Hudson*, 172.

**§ 89.4. Credibility of Witnesses; Prior Inconsistent Statement**

The court's failure to give a requested limiting instruction concerning a prior inconsistent statement a witness made to police constituted reversible error. *S. v. Erby*, 358.

**§ 89.5. Slight Variances in Corroborating Testimony**

Trial court properly admitted a witness's out-of-court statement for the purpose of corroborating the witness's trial testimony, although the corroborative statement contained a clearer indication of defendant's specific intent to shoot a robbery victim than did his trial testimony. *S. v. Whilthite*, 395.

**§ 89.6. Impeachment of Witnesses**

The trial court erred in a homicide prosecution when it failed to allow defense counsel to ask a witness if she was in love with decedent. *S. v. Erby*, 358.

**§ 91.4. Continuance on Ground of Absence of Counsel**

The trial judge did not err in denying defendant's motion for a continuance in order to allow privately retained counsel time to prepare his case for trial. *S. v. Little*, 765.

**§ 91.6. Continuance on Ground that Certain Evidence Has Not Been Provided by State**

Defendant's right of confrontation was not violated by the denial of his motion for continuance made on the ground that he was not informed until five days before trial that the State intended to use the testimony of an alleged co-participant in the crimes charged. *S. v. Pollock*, 692.

**§ 92.5. Severance**

Defendant was not denied a fair trial by the denial of his motion to sever his armed robbery trial from that of a codefendant where all of the evidence portrayed defendant as the gunman and the codefendant as an accomplice. *S. v. Woods*, 193.

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CRIMINAL LAW — Continued**§ 99.2. Court's Expression of Opinion; Questions During Trial Generally**

The trial court did not express an opinion when the court asked defense counsel at the close of the evidence whether he wanted to make a motion, defense counsel stated that he did, and the court then responded, "Motion denied." *S. v. Jackson*, 607.

**§ 99.5. Court's Expression of Opinion; Questions, Remarks and Other Conduct in Connection with Colloquies with Counsel**

Remarks by the trial judge which directed the defense counsel not to argue with the witness or the district attorney, to give the witness time to answer, or to proceed with his questions did not amount to an expression of an opinion by the court. *S. v. Poplin*, 304.

**§ 101. Conduct or Misconduct Affecting Jurors**

The denial of a motion by defendant that jurors be allowed to take to the jury room certain photographs, the warrant and the bill of indictment was within the discretion of the court. *S. v. Poplin*, 304.

**§ 101.4. Conduct or Misconduct Affecting or During Jury Deliberation**

Trial court erred in permitting the jury, over defendant's objection, to take into the jury room photographs which had been admitted into evidence, but such error was not prejudicial. *S. v. Taylor*, 113.

**§ 102. Argument and Conduct of Counsel and District Attorney**

Defendant failed to show a violation of G.S. 84-14 where he argued that the trial judge denied his motion to recess for the day at 4:20 p.m. and begin closing arguments in the morning. *S. v. Erby*, 358.

**§ 102.1. Scope of Jury Argument**

The district attorney's characterization in his closing argument that those present at the scene of the crime were "acting like a pack of wolves" did not torture the sense of the record so as to mislead the jury or deprive defendant of a fair trial. *S. v. Earnhardt*, 748.

**§ 102.6. Particular Conduct and Comments in Argument to Jury**

The prosecutor's jury argument referring to photographs as substantive evidence did not constitute such a gross impropriety as to require the court to strike such argument ex mero motu. *S. v. Woods*, 193.

The district attorney's jury argument that "you don't have the statement to consider, ladies and gentlemen of the jury, because the defendant objected to it" did not constitute a gross impropriety which would require the trial court to intervene ex mero motu. *S. v. Murphy*, 771.

**§ 111.1. Particular Miscellaneous Instructions**

The trial court did not commit reversible error by its failure to instruct the jury that a witness's identification of defendant as the perpetrator of the offense must have been the product solely of his recollection. *S. v. Brown*, 323.

From the court's use of the pronoun "they" in part of the charge to the jury, it was clear that the trial court was referring to the codefendants, and the instruction did not allow the jury to consider the codefendants' actions against defendant. *S. v. Earnhardt*, 748.

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CRIMINAL LAW — Continued**§ 112.2. Particular Charges on Reasonable Doubt**

The trial judge was not required to give instructions on reasonable doubt in the exact language of the defendant's request, and the reasonable doubt instructions were proper. *S. v. Brown*, 390.

**§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence**

The trial court adequately instructed the jury on the role of circumstantial evidence. *S. v. Rush*, 787.

**§ 113.1. Instructions; Recapitulation or Summary of Evidence**

An error in the court's charge, where it incorrectly stated that defendant, rather than another man, had received a wallet and checkbook from the victim was not prejudicial. *S. v. McLellan*, 101.

Errors in the trial judge's recapitulation of the evidence to the jury were not prejudicial. *S. v. Brown*, 323.

**§ 113.7. Charge on Aiding and Abetting**

Trial court's instruction on aiding and abetting adequately informed the jury that defendant's participation in the crime must have been advertent and pursuant to an intent to assist the actual perpetrator. *S. v. Woods*, 193.

**§ 113.8. Error in Charge**

In a prosecution for accessory after the fact to voluntary manslaughter, the court erred in instructing that defendant should be found guilty if he knew two men "could" have committed voluntary manslaughter and assisted them in attempting to escape detection. *S. v. Earnhardt*, 748.

**§ 113.9. Objection to and Correction or Cure of Misstatement or Other Error in Instructions**

Where challenged remarks in the trial court's instructions were brought to the trial judge's attention prior to the jury's deliberation, and a curative instruction was given, it is assumed that the jurors understood and complied with such an instruction. *S. v. Little*, 765.

**§ 117.2. Instruction on Credibility of Interested Witnesses**

Trial court's instruction that if the jury believed the testimony of an interested witness "then you should treat what you believe the same as you would treat other believable evidence" was not improper. *S. v. Jones*, 259.

**§ 117.3. Instruction on Credibility of State's Witnesses**

A witness was not testifying under a "grant of immunity" where he testified pursuant to an agreement that five of six charges against him would be dropped, and the trial court was not required to give special instructions concerning the witness's testimony absent a special request therefor. *S. v. Pollock*, 692.

**§ 117.4. Instruction on Credibility of State's Witnesses; Accomplices, Accessories, and Codefendants**

An instruction regarding a State's witness's plea bargain for a reduction of charges in exchange for his testimony did not improperly allow the jury to decide why the witness testified. *S. v. Earnhardt*, 748.

**§ 118. Charge on Contentions of Parties**

Defendant was not prejudiced by the court's instruction that it was the duty of the jury to remember and consider the "convictions" rather than the "contentions" urged by counsel in their arguments. *S. v. Jones*, 259.

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**CRIMINAL LAW — Continued****§ 119. Requests for Instructions**

The trial judge did not abuse his discretion in refusing to instruct the jury that it could infer from the State's failure to produce written statements made by eyewitnesses that the statements were damaging to the State's case. *S. v. Elam*, 590.

**§ 121. Instructions on Entrapment**

In a prosecution for receiving stolen goods, the instructions concerning entrapment were sufficient. *S. v. Hageman*, 274.

**§ 122.2. Additional Instructions upon Jury's Failure to Reach Verdict**

The trial judge did not err in giving additional instructions which closely paralleled those set out in G.S. 15A-1235 upon a jury's retiring for deliberation for approximately three hours and returning indicating an inability to reach a verdict. *S. v. Brown*, 390.

**§ 126. Unanimity of Verdict**

Instruction that the jury's verdict "must be unanimous, that is agreed to by all twelve of you" was sufficient without a further instruction that no juror need submit to the will of the others. *S. v. Berkley*, 163.

**§ 126.3. Impeachment of Verdict**

Trial court did not err in denying defendant's motion for appropriate relief on the ground that a juror had informed defense counsel that she understood the jury instructions to require her to conform her vote to that of the majority and in denying defendant's motion for funds to employ a reporter for the purpose of deposing such juror. *S. v. Berkley*, 163.

**§ 128. Discretionary Power of Trial Court to Set Aside Verdict and Order Mistrial**

A trial court's decision concerning whether or not to set aside verdicts involves exercise of the court's discretion, is not a question of law and is not, therefore, reviewable. *S. v. Hageman*, 274.

**§ 128.2. Particular Grounds for Mistrial**

Trial court did not err in refusing to declare a mistrial because two jurors had seen the headline of a newspaper article about prosecution of defendant as an habitual felon. *S. v. Keyes*, 75.

**§ 139. Sentence to Maximum Term**

In a prosecution for aiding and abetting the sale of cocaine, the trial court did not err in imposing the maximum sentence. *S. v. Poplin*, 304.

**§ 141. Sentence for Repeated Offenses**

An indictment alleging habitual felon status was not subject to quashal because the principal felony indictment did not refer to defendant's alleged status as an habitual offender. *S. v. Keyes*, 75.

Defendant was not prejudiced by failure of the court officially to reempanel the jury prior to the beginning of an habitual felon proceeding. *Ibid.*

**§ 146. Nature and Grounds of Appellate Jurisdiction in Criminal Cases in General**

Defendant's appeal from an order denying his request for the return of money seized from his premises after the trial judge found no probable cause at his probable cause hearing was interlocutory and must be dismissed. *S. v. Thompson*, 439.

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**CRIMINAL LAW — Continued****§ 149. Right of State to Appeal**

The Court of Appeals had jurisdiction to hear an appeal by the State from an order granting defendant's motion to suppress where the State gave oral notice of appeal on the day judgment was entered and where the State filed the prosecutor's certificate approximately a month before the record on appeal was filed. *S. v. Lay*, 796.

**§ 157. Necessary and Proper Parts of Record**

Where defendant failed to include in the record on appeal copies of the verdict, judgment, notice of appeal and appeal entry, defendant's case was technically subject to dismissal. *S. v. Earnhardt*, 748.

**§ 167. Presumptions and Burden of Showing Error**

Under App. R. 28(a), defendant's exceptions to the exclusion of certain photographs were deemed abandoned when he presented no argument to show error in the exclusion. *S. v. Harrison*, 368.

**DAMAGES****§ 3.4. Compensatory Damages for Pain, Suffering, Mental Anguish**

In a personal injury action, the trial court erred in excluding testimony by plaintiff's psychiatrist of the physical, mental and emotional injuries suffered by plaintiff as a result of an automobile accident. *Craven v. Chambers*, 151.

The trial court erred in not admitting into evidence plaintiff's medical bills from a psychiatrist. *Ibid*.

**§ 11.2. Circumstances Where Punitive Damages Inappropriate**

Defendant's failure to remain at the scene following an automobile collision was not, in and of itself, sufficient to warrant the submission of a punitive damages issue to the jury. *Craven v. Chambers*, 151.

No punitive damages may be recovered in an action based on an employee's discharge for seeking workers' compensation benefits. *Buie v. Daniel International*, 445.

**DEDICATION****§ 1. Nature and Elements of Dedication**

Plaintiff landowners' evidence was sufficient to prove the existence of an implied easement by dedication on the land to which defendants asserted title. *Whichard v. Oliver*, 219.

**DEEDS****§ 16.2. Conditions Subsequent**

A provision in a 1922 deed after the description stating that the grantee agreed "that if this site is ever abandoned for school purposes . . . the site shall be offered for sale first to" the grantor or his heirs or assigns for a specified price did not create a fee on condition subsequent and was repugnant to the estate conveyed by other provisions of the deed. *Peele v. Board of Education*, 555.

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**DEEDS – Continued****§ 21. Stipulation for Reconveyance of Land to Grantor**

A deed provision stating that "if this site is ever abandoned for school purposes . . . the site shall be offered for sale first to" the grantor or his heirs or assigns for a specified price created a preemptive right which was void as being in violation of the rule against perpetuities. *Peele v. Board of Education*, 555.

**DIVORCE AND ALIMONY****§ 1. Jurisdiction**

Trial court in a divorce and alimony action had jurisdiction over nonresident defendant who abandoned plaintiff in this State. *Robinson v. Robinson*, 737.

Where plaintiff, a resident of the state of Virginia, filed an action for absolute divorce in the district court of Mecklenburg County, and defendant resided in Rowan County, the district court in Mecklenburg had jurisdiction to try the action since defendant made no appearance and made no motion to remove the case to Rowan County. *Smith v. Smith*, 812.

**§ 14.3. Adultery as Ground for Absolute Divorce; Sufficiency of Evidence**

The evidence in a divorce action was insufficient to support a jury finding that defendant husband had committed adultery where it tended to show only that he had been alone with another woman on a few occasions in her office and once or twice at her home. *Horney v. Horney*, 725.

**§ 19.5. Effect of Separation Agreements on Alimony**

The exercise of the equitable remedy of specific performance does not alter the contractual nature of a separation agreement and does not render it a court order subject to modification. *Williford v. Williford*, 610.

**§ 21. Enforcement of Alimony Awards Generally**

The trial court did not err in entering an order adjudging defendant in willful contempt for failure to make alimony and child support payments. *Williford v. Williford*, 610.

**§ 23.3. Child Custody; Jurisdiction After Divorce**

The Jackson County District Court did not have jurisdiction to determine custody of a child who had been residing with its father in Georgia. *Holland v. Holland*, 96.

**§ 24. Child Support Generally**

Defendant's failure to deny paternity in a divorce action in which the issue of paternity was duly raised in the complaint barred a defense of nonpaternity in a subsequent action for child support. *Sutton v. Sutton*, 740.

**§ 24.8. Modification of Child Support Where Changed Circumstances Are Not Shown**

An order increasing child support payments by defendant to plaintiff from \$75 per month to \$380 per month was not supported by the findings. *Willis v. Bowers*, 244.

**§ 25.10. Modification of Child Custody Where Changed Circumstances Are Not Shown**

There was no substantial change in circumstances to justify modification of a child custody order where the evidence showed only that the mother had allowed a

**DIVORCE AND ALIMONY – Continued**

male friend to visit regularly in the evenings and to stay overnight at least once. *Harris v. Harris*, 122.

**§ 29.2. Res Judicata**

A consent judgment between plaintiff and defendant which related only to alimony, child support and child custody did not constitute res judicata in a subsequent action for absolute divorce and an accounting. *Price v. Price*, 810.

**EASEMENTS****§ 6.1. Creation of Easements by Prescription, Burden of Proof, Presumptions and Evidence**

Plaintiffs' evidence was sufficient to rebut the presumption of permissive use and to be submitted to the jury in an action to establish a prescriptive easement in a roadway across defendant's land. *Newsome v. Smith*, 419.

**ELECTIONS****§ 8.1. Right to Institute Quo Warranto; Burden of Proof**

Where petitioner was an unsuccessful candidate for county commissioner, he had the burden of showing that irregularities in an election affected the results. *In re Election of Commissioners*, 187.

**§ 10. Quo Warranto; Sufficiency of Evidence; Issues and Judgment**

In an action in which petitioner argued that an election for county commissioners should be nullified and that a new election should be held on the grounds that ballots did not leave sufficient space between the names of candidates printed on such ballots, the State Board of Elections properly ruled that a new election was not required. *In re Election of Commissioners*, 187.

The State Board of Elections properly ruled that ballots cast in a 1980 election in which the voter marked the straight Democratic circle and also wrote in some, but less than the required three, names for the office of county commissioner, should not be counted for any of the candidates whose names were printed on the ballot or for the candidate or candidates written in. *Ibid*.

The State Board of Elections did not err in refusing to set aside an election where it found that, although eleven ineligible persons voted, such irregularities did not affect the result of the election. *In re Appeal of Brown*, 629.

**EMBEZZLEMENT****§ 5. Evidence**

The State's evidence in a prosecution for possession of embezzled meat and conspiracy to possess embezzled meat was sufficient to show that the meat was owned by a county hospital corporation and that the meat had been embezzled. *S. v. Pollock*, 692.

**EVIDENCE****§ 22.2. Evidence of Conviction in Prior Criminal Prosecution**

Trial court's exclusion of insured's testimony on cross-examination that he pleaded guilty in district court to operating an illegal gambling house and operating a social club without an A.B.C. permit was not prejudicial to defendant insurer. *Connor v. Royal Globe Insur. Co.*, 1.

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**EVIDENCE — Continued****§ 29.2. Business Records**

In a hearing to terminate parental rights, testimony of two social workers, who had not worked on respondent's case until after the petition to terminate rights had been filed, was competent. *In re Smith*, 142.

**§ 44. Evidence as to Physical Condition and General Health**

It was error for the trial court to exclude testimony by plaintiff and his father concerning plaintiff's physical and mental health before and after an automobile accident. *Craven v. Chambers*, 151.

**§ 45. Evidence as to Value**

In an action concerning violation of express warranty to repair a trailer sold by defendant to plaintiff, the trial court erred in excluding plaintiff's opinion as to the value of the trailer while she inhabited it, the value of the trailer in the condition it was purchased, and the amount plaintiff paid in excess of the trailer's worth. *Simmons v. C. W. Myers Trading Post*, 549.

**§ 48. Competency and Qualification of Experts**

In a personal injury action, the trial court erred in excluding testimony by plaintiff's psychiatrist of the physical, mental and emotional injuries suffered by plaintiff as a result of an automobile accident. *Craven v. Chambers*, 151.

**§ 49. Examination Through Use of Hypothetical Questions**

The trial court improperly sustained an objection to a properly phrased hypothetical question posed to plaintiff's witness which clearly called for an opinion which he was better qualified than the jury to give. *Owens v. Green Valley Supply*, 561.

**§ 50.1. Testimony by Medical Experts; Nature and Extent of Injury**

The testimony of an expert medical witness as to the nature of plaintiff's illness was not incompetent because the witness was not a treating physician but had merely examined plaintiff for diagnostic purposes. *Ward v. Beaunit Corp.*, 128.

**EXECUTORS AND ADMINISTRATORS****§ 18. Claims Against the Estate in General**

In an action in which plaintiffs alleged that they were injured and damaged as a result of the negligent operation of an automobile owned and operated by decedent's testator, the trial court erred in granting defendant's motion for summary judgment on the basis that no written claim was filed by plaintiffs against decedent's estate within six months of the date of the first publication of defendant's notice to creditors. *Force v. Sanderson*, 423.

**§ 19. Filing of Claims Against Estate; Allowance or Refusal**

An award of arbitrators for personal services rendered to decedent could be set aside upon a showing of fraud or collusion, and respondent heirs could properly raise the issue of the validity of the award by a counterclaim to a petition by the administrator to sell realty to make assets. *Holcomb v. Hemric*, 688.

**EXTRADITION****§ 1. Generally**

The law of the demanding state furnishes the test of whether the indictment has substantially charged a crime. *Dodd v. State*, 214.



**EXTRADITION — Continued**

Petitioner had the burden of proving beyond a reasonable doubt in an extradition hearing that she was not the person named in the extradition papers. *Ibid.*

The trial court in an extradition hearing did not err in allowing in-court identification testimony without conducting a voir dire. *Ibid.*

**FALSE IMPRISONMENT****§ 2. Actions for False Imprisonment**

Plaintiff's action to recover damages for alleged false imprisonment by city police officers was barred by the statute of limitations. *Evans v. Chipps*, 232.

**FIREMEN'S PENSION ACT****§ 1. Generally**

The decision of the Industrial Commission on a claim under the death benefit act for firemen and law enforcement officers is final and conclusive. *In re Vandiford*, 224.

**GAS****§ 1. Regulation**

The Utilities Commission erred in ordering natural gas companies to pass refunds received from their supplier to their present customers. *S. ex rel. Utilities Commission v. Public Service Co.*, 448.

**GUARANTY****§ 2. Actions to Enforce Guaranty**

The trial court erred in granting summary judgment for plaintiff where a guaranty was signed after plaintiff had extended credit to the corporate defendant. *Supply Co. v. Dudley*, 622.

**HOMICIDE****§ 15.2. Evidence of Defendant's Mental Condition**

The admission of a sentence in a witness's written statement which stated that he thought the event had happened over the love defendant had for a woman was harmless error in view of all the evidence. *S. v. Harrison*, 368.

**§ 19. Evidence Competent on Question of Self-Defense**

In a homicide prosecution where the defendant alleged self-defense, the trial court erred in failing to allow defendant, on redirect examination, to explain the circumstances that led him to carry a gun on the night he shot decedent. *S. v. Erby*, 358.

**§ 19.1. Self-Defense; Evidence of Character or Reputation**

Trial court properly excluded testimony by defendant's wife tending to show the character of the deceased as being that of a dangerous and violent person. *S. v. Jones*, 259.

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**HOMICIDE — Continued****§ 20.1. Photographs**

In a prosecution for second degree murder, five photographs which portrayed various views of the room in which a victim's body was found and the body itself were admissible. *S. v. Harrison*, 368.

Under App. R. 28(a), defendant's exceptions to the exclusion of certain photographs were deemed abandoned when he presented no argument to show error in the exclusion. *Ibid*.

**§ 21.1. Sufficiency of Evidence Generally**

In a second degree murder case, the trial court did not err in denying defendant's motions for nonsuit and for appropriate relief. *S. v. Stanley*, 109.

**§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder**

The evidence was sufficient to support defendant's conviction of second degree murder. *S. v. Jones*, 259.

The State's evidence was sufficient to support conviction of defendant for second degree murder, although defendant did not actually pull the trigger of the gun which killed the victim, where it showed that defendant qualified as a principal in the second degree in the commission of the crime. *S. v. Whitte*, 395.

The State's evidence aliunde defendant's confession was sufficient to support conviction of defendant for second degree murder. *S. v. Dowless*, 578.

**§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter**

In an action in which defendant was charged with the murder of his former wife, the evidence was sufficient to survive defendant's motion to dismiss and to require submission of the charge of voluntary manslaughter to the jury. *S. v. Hudson*, 172.

Evidence was sufficient to support defendant's conviction of involuntary manslaughter. *S. v. Stanley*, 109.

**§ 24.1. Presumptions Arising from Use of Deadly Weapon**

There was no merit to defendant's contention that presumptions of unlawfulness and malice are not constitutionally acceptable where there is evidence of self-defense. *S. v. Jones*, 259.

**§ 27.2. Instructions on Involuntary Manslaughter**

Where all the evidence, including that of defendant, indicated that she intentionally fired a weapon, the trial court properly failed to instruct on the defense of an accidental killing and involuntary manslaughter. *S. v. Elam*, 590.

**§ 28. Instructions on Self-Defense Generally**

Trial court's confusing instructions on "without justification or excuse" were not prejudicial. *S. v. Jones*, 259.

Trial court did not err in failing to give defendant's requested instructions on deceased's previous acts of violence and his reputation for violence. *S. v. Harrison*, 368.

The trial judge in a homicide prosecution erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury. *S. v. Kelly*, 442.

The trial court's failure to apply evidence of deceased's reputation for violence to the question of defendant's reasonable apprehension of death or great bodily harm was not prejudicial error. *S. v. Elam*, 590.

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**HOMICIDE — Continued****§ 28.4. Instructions on Self-Defense; Duty to Retreat**

In a prosecution for second degree murder in which defendant claimed self-defense, where the evidence was insufficient to indicate that defendant was in a place from which he had no duty to retreat, the trial judge did not err in failing to give the requested instruction. *S. v. Harrison*, 368.

**HUSBAND AND WIFE****§ 1. Mutual Rights and Duties; Right to Wife's Services and Obligation to Support**

Defendant husband was not liable for goods sold on account to defendant wife where the evidence showed that defendants were separated at the times the items were purchased by the wife and plaintiff failed to show that the items were necessities. *Cole v. Adams*, 714.

**INDEMNITY****§ 3. Actions**

In an action concerning the negligent construction of a fireplace, plaintiffs' release of a subcontractor did not operate to release the contractor. *Sullivan v. Smith*, 525.

**INDICTMENT AND WARRANT****§ 16. Effect of Quashal**

Where the State elected to prosecute a felony and a misdemeanor charge against defendant separately, and where the charges stemmed from a search pursuant to only one search warrant, the State was not collaterally estopped from proceeding under the search warrant on the felony charge after the district court in the misdemeanor case ordered the same warrant quashed on defendant's motion to suppress. *S. v. Lay*, 796.

**§ 17.2. Variance as to Time**

There was no fatal variance between an indictment charging the sale of marijuana on 30 October and testimony by the prosecuting witness that the sale occurred on 5 November. *S. v. Ellers*, 683.

**INFANTS****§ 5. Jurisdiction to Award Custody of Minor**

The Jackson County District Court did not have jurisdiction to determine custody of a child who had been residing with its father in Georgia. *Holland v. Holland*, 96.

**§ 16. Juvenile Delinquency Hearings Generally**

Trial court erred in failing to dismiss a juvenile petition for failure of the intake counselor to confer with either the juvenile or her guardian before the petition was issued. *In re Tate*, 241.

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## INSURANCE

### § 29.1. Change of Beneficiary

The omission of a policy number from decedent's change of beneficiary form was due to the unilateral mistake of decedent, and the proceeds of his insurance policy should be paid to decedent's first wife, as named beneficiary on the policy. *Light v. Equitable Life Assurance Society*, 26.

### § 67.3. Action on Accident Insurance Policy; Instructions

In an action to recover death benefits under an accident policy, the trial court did not err in instructing the jury that if it was unable to determine where the truth lies about insured's death, it should not find an accidental death. *Moore v. Insurance Co.*, 741.

### § 105. Automobile Liability Insurance; Actions Against Insurer

In an action in which plaintiffs alleged that they were injured and damaged as a result of the negligent operation of an automobile owned and operated by decedent's testator, the trial court erred in granting defendant's motion for summary judgment on the basis that no written claim was filed by plaintiffs against decedent's estate within six months of the date of the first publication of defendant's notice to creditors. *Force v. Sanderson*, 423.

## JUDGMENTS

### § 36.3. Conclusiveness of Judgments; Joint Tort-feasors

A judgment entered in Tennessee pursuant to a trial on the merits against two tort-feasor defendants was *res judicata* as to the rights existing between the tort-feasor defendants in a subsequent action for contribution. *Great West Casualty Co. v. Fletcher*, 247.

### § 37.4. Preclusion or Relitigation of Judgments in Particular Proceedings

A consent judgment between plaintiff and defendant which related only to alimony, child support and child custody did not constitute *res judicata* in a subsequent action for absolute divorce and an accounting. *Price v. Price*, 810.

### § 51.1. Foreign Judgments; Lack of Jurisdiction as Defense

In an action to enforce a judgment entered by a Virginia court, the trial court erred in entering summary judgment in favor of plaintiff where there was a genuine issue concerning the jurisdiction of the Virginia court which rendered the judgment. *Old Dominion Distributors v. Bissette*, 200.

## LABORERS' AND MATERIALMEN'S LIENS

### § 3. Lien of Subcontractor or Material Furnisher; Recovery Against Owner

Plaintiff subcontractor could not perfect a lien by subrogation under G.S. 44A-23 where the prime contractor had made an agreement with the landowner that it would not perfect a lien against the property of the landowner. *Con Co v. Wilson Acres Apts.*, 661.

Defendant mortgage lender was not an "obligor" under G.S. 44A-17 and thus did not become obligated to plaintiff first tier subcontractor when it advanced money to the owner after being notified of plaintiff's claim of lien against the prime contractor and the amount advanced was paid to the prime contractor. *Ibid.*

## LANDLORD AND TENANT

### § 6.1. Premises Demised; Appurtenances and Easements

The trial court erred in ruling as a matter of law that plaintiff landlord was not required by the terms of a lease to construct a rear access road to its shopping center. *Investment Trust v. Belk-Tyler*, 363.

### § 8.1. Covenant to Repair Demised Premises

Plaintiff's claim for relief based upon an alleged breach of the Residential Rental Agreement act by defendant was invalid. *Simmons v. C. W. Myers Trading Post*, 549.

### § 9. Duties and Liabilities of Landlord as to Portion of Premises Remaining Under His Control

Summary judgment was improperly granted for defendants in a negligence action in which a minor plaintiff testified that she was injured when her bicycle hit a stump in the recreation area of defendants' apartment building. *Allen v. Equity & Investors Management Corp.*, 706.

## LARCENY

### § 1. Definition; Elements of the Crime Generally

There was no fatal variance between an indictment charging defendant with larceny by an employee and the evidence offered at trial. *S. v. Brown*, 228.

### § 4. Indictment

In a prosecution for larceny by an employee, an indictment which alleged that cows were delivered to defendant "to be kept to the use of" his employer sufficiently alleged a trust delivery. *S. v. Brown*, 228.

In a prosecution for larceny by an employee, an indictment was not inadequate because it failed to allege that defendant was at least 16 years of age. *Ibid.*

### § 7.4. Sufficiency of Evidence; Possession of Stolen Property

In a prosecution for felonious possession of stolen goods, a witness's in-court identification of a diamond which had been stolen was not so "inherently incredible" that the case should not have gone to the jury. *S. v. Andrews*, 91.

## LIMITATION OF ACTIONS

### § 4.1. Accrual of Tort Cause of Action

The three-year time limitation prescribed for actions founded on "a liability created by statute, either state or federal" applies to actions under 42 U.S.C. §§ 1983 and 1985(3) to recover damages for deprivation of civil rights under color of State law and for conspiracy to deprive plaintiff of his civil rights. *Evans v. Chipps*, 232.

The statute requiring a malpractice action based upon the leaving of a foreign object in the body to be commenced within one year after discovery thereof did not operate retrospectively on an accrued cause of action where plaintiff's injury was not discovered until after the effective date of the statute. *Roberts v. Durham County Hospital Corp.*, 533.

### § 11. Effect of Personal Disability or Incapacity

The fact that defendant was in prison and needed time to prepare his complaint did not prevent the statute of limitations from running against his suit to recover damages for alleged violations of his civil rights. *Evans v. Chipps*, 232.

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**LIMITATION OF ACTIONS — Continued****§ 12.2. New Action After Failure of Original Suit; Original Action Filed in Federal Court**

Plaintiff's filing of a complaint in federal district court would not prevent the statute of limitations from barring his action in the state court. *Evans v. Chipps*, 232.

**MALICIOUS PROSECUTION****§ 7. Limitations**

Plaintiff's actions against a city and its police officers for alleged malicious prosecution was barred by the statute of limitations. *Evans v. Chipps*, 232.

**MASTER AND SERVANT****§ 9. Actions to Recover Compensation**

The trial court erred in entering summary judgment for defendant employer in plaintiff's action to recover termination pay but properly entered summary judgment for defendant in plaintiff's action to recover overtime pay. *Brooks v. Carolina Telephone*, 801.

**§ 10.2. Actions for Wrongful Discharge**

Plaintiff's complaint was insufficient to state a claim for relief for wrongful discharge from her employment. *Brooks v. Carolina Telephone*, 801.

**§ 21. Liability of Contractee for Injuries to Third Persons**

In an action concerning the negligent construction of a fireplace, plaintiffs' release of a subcontractor did not operate to release the contractor. *Sullivan v. Smith*, 525.

**§ 55.1. Workers' Compensation; Necessity for and What Constitutes Accident**

Where the Industrial Commission found that plaintiff suffered from obstructive lung disease but that her disability was independently caused by non-occupational pulmonary fibrosis, the Commission erred in making an award to plaintiff for permanent injury to an important organ under G.S. 97-31(24). *Harrell v. Harriet and Henderson Yarns*, 697.

**§ 56. Workers' Compensation; Causal Relation Between Employment and Injury**

In a workers' compensation proceeding in which decedent died as a result of multiple stab wounds inflicted upon her after she engaged in a fight with another employee, it was not sufficient for the Industrial Commission to find that decedent's actions were such as to have merely contributed to her injury and death. *Rorie v. Holly Farms*, 331.

**§ 57. Workers' Compensation; Negligence or Willful Act of Injured Employee**

In a workers' compensation proceeding, a finding of premeditation coupled with an initial assault intending serious injury is necessary to support a conclusion that a plaintiff's recovery is barred by her willful intent to injure another. *Rorie v. Holly Farms*, 331.

**§ 68. Workers' Compensation; Occupational Diseases**

The Commission's findings in a workers' compensation proceeding as to plaintiff's total disability were supported by the evidence. *Hyatt v. Waverly Mills*, 14.

**MASTER AND SERVANT — Continued**

The Commission was justified in finding an occupational exposure to be the sole cause of a claimant's injury. *Ibid.*

Defendant cotton processor was liable for plaintiff's full disability from byssinosis as his employer at the time of his last injurious exposure although plaintiff worked for defendant for only six months in 1966 and 1967. *Frady v. Groves Thread*, 61.

The Industrial Commission did not err in finding that plaintiff was totally disabled due to exposure to cotton dust when the examining physician testified that plaintiff's lung condition was attributable about 50% to cigarette smoking, about 40% to cotton dust, and about 10% to synthetic dust. *Ibid.*

Although plaintiff was last employed by defendant employer in 1967, he was entitled to benefits for disability from byssinosis based on the wages he was earning from another employer when he became disabled in 1973. *Ibid.*

In a workers' compensation proceeding, findings of the Commission which stated that exposure to cotton dust at defendant's plant did not cause or significantly contribute to plaintiff's pulmonary disease were supported by medical evidence. *Rutledge v. Tultex Corp.*, 345.

The Commission erred in requiring a plaintiff to prove that her last employment was the cause of her occupational disease. *Ibid.*

In light of *Walston v. Burlington Industries*, the medical evidence in a workers' compensation proceeding did not establish that plaintiff had an occupational disease. *Ibid.*

Byssinosis was not an occupational disease at the time plaintiff became disabled on 5 January 1963. *Taylor v. Cone Mills*, 291.

Where the medical evidence tended to show that plaintiff suffered from the occupational disease byssinosis and from non-occupational diseases, but the evidence in the record was not sufficiently definite as to the cause of plaintiff's disability, the cause must be remanded for further medical testimony and findings. *Garner v. J. P. Stevens and Co.*, 315.

The Industrial Commission's findings that decedent was not disabled as a result of an occupational disease were supported by the evidence and the findings supported the conclusion and award denying benefits. *Moore v. Piedmont Processing Company*, 594.

The evidence required the denial of benefits based on disability from an occupational disease under G.S. 97-52 where there was medical evidence that some portion of plaintiff's total lung impairment might be attributable to cotton dust but that plaintiff's disability was independently caused by non-occupational pulmonary fibrosis. *Harrell v. Harriet and Henderson Yarns*, 697.

In a workers' compensation proceeding, evidence that plaintiff's employment was merely a "possible etiologic factor" in causing his lung disease supported the Commission's finding that plaintiff's lung disease had an insufficient causal relationship with his employment to grant him compensation. *Lumpkins v. Fieldcrest Mills*, 653.

**§ 69. Workers' Compensation; Amount of Recovery Generally**

No punitive damages may be recovered in an action based on an employee's discharge for seeking workers' compensation benefits. *Buie v. Daniel International*, 445.

In an action based on an employee's discharge for seeking workers' compensation benefits, the trial court correctly dismissed the employee's claim for treble damages for defendant's alleged unfair trade practices. *Ibid.*

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**MASTER AND SERVANT — Continued****§ 69.2. Workers' Compensation; Successive Injuries**

The onset of non-work-related diseases following work-related disablement does not affect in any way plaintiff's entitlement to compensation as of the date of his work-related injury. *Hyatt v. Waverly Mills*, 14.

**§ 71. Workers' Compensation; Computation of Average Weekly Wage Under Exceptional Circumstances**

The Commission's methodology used in determining plaintiff's "average weekly wages" was fair and just to both parties. *Hyatt v. Waverly Mills*, 14.

**§ 77.1. Workers' Compensation; Modification of Award; Grounds; Change of Condition**

The Industrial Commission erred in concluding plaintiff had suffered a change in condition between the date of his first disability rating and the date of a hearing which increased his permanent partial disability. *McLean v. Roadway Express*, 451.

**§ 87.2. Claim Under Workers' Compensation Act as Precluding Common Law Action; Determination of Jurisdiction by Superior Court**

Where plaintiff filed a motion for a new trial with the Industrial Commission after notice of appeal to an appellate court was entered, and neither the motion nor the Commission's ruling was made a part of the record on appeal, and a motion for a new trial based on newly discovered evidence was not made in the appellate court, the appellate court was unable to entertain or consider plaintiff's motion. *Lankford v. Dacotah Cotton Mills*, 250.

**§ 91. Filing of Workers' Compensation Claim Generally**

The Industrial Commission properly concluded that it lacked jurisdiction over a workers' compensation action due to the fact that a claim was not filed with the Commission within two years after plaintiff's accident. *Gantt v. Edmos Corporation*, 408.

Defendants were not estopped to plead G.S. 97-24, the two-year statute of limitations for filing workers' compensation claims before the Commission. *Ibid*.

**§ 93.3. Workers' Compensation; Proceedings before Commission; Expert Evidence**

The Industrial Commission erroneously concluded that the testimony of an expert medical witness as to the nature of plaintiff's illness was not competent because the history plaintiff gave the witness differed somewhat from plaintiff's testimony at the hearing and from plaintiff's statements in an insurance application. *Ward v. Beaunit Corp.*, 128.

The testimony of an expert medical witness as to the nature of plaintiff's illness was not incompetent because the witness was not a treating physician but had merely examined plaintiff for diagnostic purposes. *Ibid*.

**§ 95. Workers' Compensation; Right to Appeal**

The decision of the Industrial Commission on a claim under the death benefit act for firemen and law enforcement officers is final and conclusive. *In re Vandiford*, 224.

**§ 95.1. Workers' Compensation; Procedure to Perfect Appeal**

The Commission did not err in denying plaintiff's motion to dismiss defendants' appeal for failure to timely perfect it and to award plaintiff additional compensation for defendants' failure to pay plaintiff's award when due under G.S. 97-18. *Hyatt v. Waverly Mills*, 14.



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**MASTER AND SERVANT — Continued****§ 96.5. Workers' Compensation; Specific Instances Where Commission's Findings Are Conclusive or Sufficient**

The Commission's finding that plaintiff's back injury did not arise by accident because plaintiff's testimony was not credible was supported by the evidence. *Lankford v. Dacotah Cotton Mills*, 250.

**§ 97.1. Workers' Compensation; Judgment of Appellate Court; Remand**

An action in which the Industrial Commission denied plaintiff compensation for disability allegedly resulting from byssinosis must be remanded for further proceedings where the Commission erroneously failed to consider all competent evidence adduced at the hearing. *Ward v. Beaunit Corp.*, 128.

**§ 102. Liability for Employment Security Tax Generally**

An ordained minister who worked as a house parent at a Baptist Children's Home was performing services "in the exercise of his ministry" and was exempt from the Employment Security Law if the Children's Home was in fact an integral agency of the Baptist State Convention. *In re Baptist Children's Home v. Employment Security Comm.*, 781.

**§ 108. Right to Unemployment Compensation Generally**

The evidence and findings supported a determination that a former school employee was disqualified for unemployment compensation benefits because she left work voluntarily without good cause attributable to her employer. *In re Whicker v. High Point Schools*, 253.

**§ 108.1. Right to Unemployment Compensation; Effect of Misconduct**

Employees were not discharged for misconduct in connection with their work and thus were not disqualified to receive unemployment compensation benefits where they were discharged for gambling and the evidence showed only that they were playing cards on the employer's premises but failed to show that they were playing for anything of value. *In re Kidde & Co. v. Bradshaw*, 718.

**§ 111. Unemployment Compensation; Appeal and Review**

Under G.S. 96-4(m), even though defendant was not "aggrieved" by the Employment Security Commission's conclusion in a decision involving unemployment benefits, it could have brought its exceptions to the Commission's findings before the superior court, and its failure to do so precluded consideration of the exceptions by this Court. *In re Cianfarra v. Dept. of Transportation*, 380.

In an unemployment compensation proceeding, the superior court did not err in finding that the Commission's findings of fact did not support its conclusion. *Ibid.*

**MORTGAGES AND DEEDS OF TRUST****§ 19.6. Grounds for Injunctive Relief**

In an action in which plaintiffs alleged that defendant had violated his employment contract and breached the fiduciary duties owed plaintiffs, the trial court erred in denying plaintiffs' motion for a preliminary injunction to enjoin foreclosure proceedings instituted by defendant until the resolution of the action against defendant. *Superscope, Inc. v. Kincaid*, 673.

**§ 36. Estoppel and Waiver of Right to Attack Foreclosure**

In an action to set aside a foreclosure sale, the evidence presented on a motion for summary judgment failed to show that plaintiffs or an agent for plaintiffs

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**MORTGAGES AND DEEDS OF TRUST – Continued**

tendered payment of the obligations secured by the deed of trust prior to the sale and showed that plaintiffs ratified the foreclosure sale by endorsing a check for the surplus from the sale. *Leonard v. Pell*, 405.

**MUNICIPAL CORPORATIONS****§ 2.1. Annexation; Compliance with Statutory Requirements in General**

The trial court properly ordered and declared the annexation by defendant town of property owned by plaintiff county to be illegal. *County of Brunswick v. Town of Bolivia*, 732.

**NARCOTICS****§ 1.1. Activities Regulated or Prohibited**

The State is not required to show both a transfer of five or more grams of marijuana and receipt of remuneration in order to submit to the jury the offense of delivery of marijuana. *S. v. Pevia*, 384.

**§ 2. Indictment**

Where an indictment charged that defendant aided and abetted in the sale and delivery of cocaine, the failure to name the party whom the defendant aided and abetted did not violate G.S. 15A-924. *S. v. Poplin*, 304.

There was no fatal variance between an indictment charging the sale of marijuana on 30 October and testimony by the prosecuting witness that the sale occurred on 5 November. *S. v. Ellers*, 683.

**§ 4. Sufficiency of Evidence**

There was sufficient evidence to support defendant's conviction of aiding and abetting in the sale of cocaine. *S. v. Poplin*, 304.

The State's evidence was sufficient to support defendant's conviction of delivery of marijuana where it tended to show that an undercover agent gave defendant money with which to purchase marijuana and that defendant returned to the agent a bag of marijuana. *S. v. Pevia*, 384.

The evidence of conspiracy to sell or deliver methaqualone was sufficient for submission to the jury. *S. v. Gray*, 667.

**§ 4.2. Sufficiency of Evidence in Cases Involving Sale to Undercover Narcotics Agent**

The State's evidence was sufficient for the jury in a prosecution for possession of marijuana and amphetamines with the intent to sell or deliver where it tended to show that defendant purchased marijuana and amphetamines for an undercover agent with money given to her by the agent. *S. v. Pevia*, 384.

The State's evidence did not show entrapment as a matter of law in defendant's purchase of marijuana and amphetamines for an undercover agent with money given to her by the agent. *Ibid.*

**§ 4.3. Sufficiency of Evidence of Constructive Possession**

The State's evidence was sufficient for the jury to find that marijuana was found in a house under the control of defendant and that he thus had constructive possession of the marijuana. *S. v. Collins*, 352.

**NARCOTICS — Continued****§ 4.7. Instructions as to Lesser Offenses**

The trial court did not err in submitting the offense of possession of methaqualone as a lesser included offense of possession of methaqualone with intent to sell or deliver. *S. v. Gray*, 667.

**§ 5. Verdict**

A defendant convicted of "selling" marijuana to a minor under 16 years of age was not subject to the increased punishment of G.S. 90-95(e)(5) since that statute applies only to a person convicted of "delivering" a controlled substance. *S. v. Ellers*, 683.

The trial court committed prejudicial error in entering judgment for a felony instead of a misdemeanor where defendant was convicted of the misdemeanor. *S. v. Gray*, 667.

**NEGLIGENCE****§ 2. Negligence Arising from Performance of a Contract**

In an action in which plaintiff homeowner sought damages resulting from a fire in the fireplace which defendant subcontractor constructed under the guidance of defendant contractor, the trial court erred in granting judgment n.o.v. for defendant contractor. *Sullivan v. Smith*, 525.

**§ 18. Contributory Negligence of Minors**

Summary judgment was improperly granted for defendants in a negligence action in which a minor plaintiff testified that she was injured when her bicycle hit a stump in the recreation area of defendants' apartment building. *Allen v. Equity & Investors Management Corp.*, 706.

**§ 29. Sufficiency of Evidence of Negligence Generally**

In an action which grew out of an explosion of a heater purchased by plaintiffs from defendant, the trial court erred in directing a verdict for defendant. *Arrington v. Brad Ragan, Inc.*, 416.

**PARENT AND CHILD****§ 1. Creation and Termination of Relationship**

The trial court did not err in referring to G.S. 7A-517 when defining "abandonment." *In re Smith*, 142.

Petitioner was properly allowed to amend its complaint to add G.S. 7A-289.32(3) as a ground for termination of parental rights where petitioner's evidence and the testimony elicited by respondent on cross-examination brought the amendment within G.S. 1A-1, Rule 15(b). *Ibid.*

In a hearing to terminate parental rights, testimony of two social workers, who had not worked on respondent's case until after the petition to terminate rights had been filed, was competent. *Ibid.*

The trial court's conclusion that respondent's right to her children be terminated was supported by clear, cogent and convincing evidence. *Ibid.*

In a proceeding to terminate parental rights, the applicable statutes were not unconstitutionally applied where the evidence amply supported not one but several of the statutory grounds required to terminate parental rights. *Ibid.*

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**PARENT AND CHILD — Continued**

The trial court erred in providing a copy of the transcript to counsel without cost to respondent in a proceeding to terminate parental rights where the Legal Services Corporation made a determination of indigency and undertook to represent respondent. *Ibid.*

**§ 7.3. Enforcement of Parental Obligation to Support**

Defendant's failure to deny paternity in a divorce action in which the issue of paternity was duly raised in the complaint barred a defense of non-paternity in a subsequent action for child support. *Sutton v. Sutton*, 740.

**PARTITION****§ 1.2. Right to Partition; Persons Between Whom Partition May Be Had**

G.S. 46-25 does not require all cotenants to have the same type interest in the land in order to petition for a sale of standing timber and is not limited in application to only those tracts of land in which interests are subject to a life estate. *Bridgers v. Bridgers*, 617.

**§ 2. Waiver of Right to Partition and Limitations and Agreements Affecting Right**

Remainderman in a one-half interest in two tracts of land could seek a sale of the timber on the two tracts of land even if an equitable division of the property was possible. *Bridgers v. Bridgers*, 617.

**PARTNERSHIP****§ 2. Extent of Partnership Business; Assignment of Partner's Interest**

A conveyance vested title to realty in a partnership rather than in the partners as individuals, and legal title remained in the partnership where one partner purportedly conveyed his interest in the property to the other partner but the property was not conveyed in the partnership name. *Simmons v. Quick Stop Food Mart*, 105.

**PERJURY****§ 1. Nature and Essentials of Offense**

Solicitation to commit perjury is an "infamous offense" which is a felony within the original jurisdiction of the superior court. *S. v. Huff*, 721.

**§ 2. Subornation of Perjury**

The common law crime of solicitation of perjury has not been supplanted by the subornation of perjury statute. *S. v. Huff*, 721.

**PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS****§ 13. Limitation of Actions for Malpractice**

The statute requiring a malpractice action based upon the leaving of a foreign object in the body to be commenced within one year after discovery thereof did not operate retrospectively on an accrued cause of action where plaintiff's injury was not discovered until after the effective date of the statute. *Roberts v. Durham County Hospital Corp.*, 533.

**PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS — Continued**

The statute requiring a malpractice action based upon the leaving of a foreign object in the body is not unconstitutionally vague and does not violate equal protection or the exclusive emoluments provision of the N.C. Constitution. *Ibid.*

**PROCESS****§ 9. Personal Service on Nonresident Individuals in Another State**

In an action in which plaintiff asked for an accounting from the defendant for money which she received in Florida, the action was neither in rem nor quasi in rem since the action did not affect the debt which was owed by the persons in North Carolina to the parties to the suit nor did the plaintiff garnish the debt in this State as an ancillary proceeding to the action. *Whitener v. Whitener*, 599.

The district court properly dismissed an action by plaintiff for an accounting by defendant of monies she had received in Florida as payments on a purchase money note secured by a deed of trust on property in North Carolina due to lack of in personam jurisdiction. *Ibid.*

**§ 9.1. Personal Service on Nonresident Individuals in Another State; Minimum Contacts Test**

The third-party defendants had insufficient contacts with North Carolina to permit the courts of this State to assert in personam jurisdiction over them in an action to recover damages for the allegedly defective printing, binding and mailing of plaintiff's sales catalogs. *Kaplan School Supply v. Henry Wurst, Inc.*, 567.

**PROFESSIONS AND OCCUPATIONS****§ 1. Generally**

In a contract action in which plaintiff sought to recover damages caused by a fire in a housing project, the trial court did not err in entering judgment of involuntary dismissal at the close of plaintiff's evidence. *Housing Authority v. Kirkpatrick & Associates*, 400.

**QUASI CONTRACTS AND RESTITUTION****§ 2.1. Actions to Recover on Implied Contracts; Sufficiency of Evidence**

Trial court did not err in failing to submit an issue of quantum meruit in an action to recover unpaid maintenance charges allegedly due under the terms of a lease. *Investment Trust v. Belk-Tyler*, 363.

**RAPE AND ALLIED OFFENSES****§ 2. Parties and Offenses**

The threat of serious bodily harm which reasonably induces fear thereof constitutes sufficient force for a second degree sexual offense. *S. v. Berkley*, 163.

**§ 4.3. Evidence of Character or Reputation of Prosecutrix; Unchastity**

The trial court did not err in excluding testimony that the victim was using birth control pills at the time of an alleged rape. *S. v. Bridwell*, 572.

**§ 5. Sufficiency of Evidence**

Where the evidence taken in the light most favorable to the State established all the elements of second degree rape, the trial court did not err in failing to grant defendant's motion for nonsuit. *S. v. Bridwell*, 572.

**RAPE AND ALLIED OFFENSES — Continued****§ 6. Instructions**

The trial court's instruction requiring a finding that defendant had "sexual intercourse" with the prosecutrix was a sufficient charge on the "vaginal intercourse" element of second degree rape under the circumstances of this case. *S. v. Barnes*, 515.

**§ 6.1. Instructions on Lesser Degrees of the Crime**

The trial court in a prosecution for second degree rape did not err in failing to submit an issue as to the lesser included offense of assault. *S. v. Barnes*, 515.

**RECEIVING STOLEN GOODS****§ 1.1. Property Actually Stolen**

Where defendant was indicted for receiving stolen goods, even though the stolen goods were actually intercepted and taken in by police and such interception changed the character of the goods so that no receipt of stolen goods was possible, the defendant nevertheless could have been convicted of attempting to receive stolen goods. *S. v. Hageman*, 274.

**§ 1.2. Attempt to Commit the Offense**

An attempt to receive stolen goods is a misdemeanor, not a felony; therefore, a conviction for felonious attempt to receive stolen goods cannot stand. *S. v. Hageman*, 274.

**§ 5.1. Sufficiency of Evidence**

The evidence was sufficient to go to the jury in a prosecution for receiving stolen goods. *S. v. Hageman*, 274.

In a prosecution for felonious possession of stolen building materials, the evidence was sufficient to permit an inference that defendant owned or controlled the premises on which the materials were found and that the materials were those stolen from the alleged victim. *S. v. Carter*, 435.

**ROBBERY****§ 4.2. Common Law Robbery Cases Where Evidence Held Sufficient**

Evidence was sufficient to permit the jury to infer that defendant parted with \$25 because of fear for his life and safety. *S. v. Berkley*, 163.

**§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient**

An armed robbery conviction was not improper because the victim was first shot and then robbed. *S. v. Whilite*, 395.

The State's evidence was sufficient to show that defendant committed a robbery with a deadly weapon. *S. v. Murphy*, 771.

**RULES OF CIVIL PROCEDURE****§ 8. General Rules of Pleading**

In an action to recover under a fire insurance policy in which defendant insurer counterclaimed for an amount it had paid to the mortgagee, plaintiffs' failure to file a reply to the counterclaim did not constitute an admission of allegations in the counterclaim that plaintiffs violated conditions of the policy. *Connor v. Royal Globe Insur. Co.*, 1.

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**RULES OF CIVIL PROCEDURE – Continued**

Trial court's instructions on waiver were inconsistent with the pleadings in violation of Rule 8(c) where the plea of waiver had been stricken by court order. *Investment Trust v. Belk-Tyler*, 363.

The fact that defendant failed to plead the affirmative defense of failure of consideration with respect to a guaranty did not prevent the trial court from considering the question of failure of consideration. *Supply Co. v. Dudney*, 622.

**§ 15. Amended Pleadings**

In an action to enjoin the foreclosure of two deeds of trust on lands owned by plaintiff, the trial court erred as a matter of law in failing to rule on plaintiff's motion to amend its complaint before granting defendants' motion for summary judgment. *Carolina Builders v. Gelder & Associates*, 638.

**§ 15.2. Amendments to Conform to the Evidence**

Petitioner was properly allowed to amend its complaint to add G.S. 7A-289.32(3) as a ground for termination of parental rights where petitioner's evidence and the testimony elicited by respondent on cross-examination brought the amendment within G.S. 1A-1, Rule 15(b). *In re Smith*, 142.

**§ 20. Permissive Joinder of Parties**

Under G.S. 1A-1, Rule 20(a), permissive joinder, plaintiffs, landowners in a beach development, were entitled to sue collectively defendant landowners without being certified as a class for the purposes of a G.S. 1A-1, Rule 23 class action. *Whichard v. Oliver*, 219.

**§ 32. Use of Depositions in Court Proceedings**

Where defendant offered part of a deposition into evidence, the trial court did not err in compelling defendant to offer certain additional deposition testimony relevant to that already in evidence. *The Property Shop v. Mountain City Investment Co.*, 644.

**§ 33. Interrogatories**

Interrogatories were improperly served on arbitrators who were not parties to the action. *Holcomb v. Hemric*, 688.

**§ 37. Failure to Make Discovery; Consequences**

Trial court's order compelling defendant to respond to interrogatories and requests for admissions and imposing sanctions and default judgment for his failure to do so did not violate defendant's constitutional right against compulsory self-incrimination because plaintiffs sought punitive damages for fraud and body execution. *Stone v. Martin*, 473.

**§ 56. Summary Judgment**

The trial court did not err in allowing oral testimony at a hearing on a motion for summary judgment. *Propst Construction Co. v. Dept. of Transportation*, 759.

**§ 68. Offer of Judgment**

Defendant's offer of judgment which expressly excluded attorney's fees from the tender of "costs then accrued" was invalid as a Rule 68 offer of judgment and was ineffectual to terminate plaintiff's entitlement to attorney's fees and expert witness fees which the court might allow in its discretion. *Purdy v. Brown*, 792.

## SEALS

### § 1. Generally

A consideration defense was not rendered moot by the fact that the guaranty was signed under seal. *Supply Co. v. Dudney*, 622.

## SEARCHES AND SEIZURES

### § 11. Probable Cause for Search and Seizure of Vehicles

A police officer had probable cause to believe defendant's automobile contained stolen property. *S. v. Rogers*, 457.

An officer did not have probable cause to search defendant's van for marijuana without a warrant. *S. v. Mackey*, 468.

### § 16. Consent to Search Given by Members of Household

The trial court properly admitted into evidence items obtained pursuant to warrantless searches of a house and an automobile. *S. v. Howard*, 41.

Officers lawfully examined building materials in the backyard of defendant's home pursuant to consent given by defendant's wife who had an equal right to and common authority over the premises. *S. v. Carter*, 457.

### § 23. Application for Warrant; Sufficiency of Showing of Probable Cause

An officer's affidavit to obtain a search warrant contained sufficient information for the issuing official to determine that there were reasonable grounds to believe that illegal drugs were present in the house to be searched. *S. v. Collins*, 352.

### § 24. Application for Warrant; Sufficiency of Showing of Probable Cause; Information from Informers

Where undercover officers observed an informant go to defendant's house with instructions to purchase LSD and come out three or four minutes later with LSD which he gave to the officers, one officer's affidavit to obtain a warrant to search defendant's house was not based on hearsay, and it was not necessary for the affidavit to set forth facts showing the credibility of the informant or the reliability of the information. *S. v. Collins*, 352.

### § 37. Scope of Search Incident to Arrest; Vehicles

When an officer lawfully arrests a person who is in a motor vehicle, the officer has an absolute right to search the passenger area and any container found in the passenger area of the vehicle. *S. v. Todd*, 116.

## STATE

### § 5. Nature and Construction of Tort Claims Act in General

The superior court judge erred in failing to dismiss plaintiff's claim against the State Ports Authority as it is an agency of the State and, as such, actions in tort against it must be instituted pursuant to the North Carolina Tort Claims Act. *Guthrie v. State Ports Authority*, 68.

### § 8.1. Tort Claims Act; Negligence of State Employee; Contributory Negligence of Person Injured

In a tort claim action to recover damages allegedly resulting from the negligence of an assistant clerk of court in causing the Department of Motor Vehicles erroneously to revoke plaintiff's driver's license, plaintiff was not con-



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**STATE — Continued**

tributorily negligent in failing to notify the clerk of court or the Department of Motor Vehicles that his license had been revoked by mistake. *Caviness v. Administrative Office of the Courts*, 542.

**TAXATION****§ 25.4. Assessment and Levy of Ad Valorem Taxes; Valuation**

An appraisal of petitioner's store building for ad valorem tax purposes, although based on a cost rather than an income approach, was supported by a market appraisal and was not arbitrary. *In re Odom*, 412.

**§ 28.4. Individual Income Tax Refunds**

A hearing conducted by the Refund Committee of UNC-Greensboro to review the asserted basis for a setoff of a student debtor's delinquent account against his income tax refund should have been recorded and an official record of the hearing should have been made. *Appeal of Willett*, 584.

**TORTS****§ 3.1. Rights Inter Se of Defendants Joined by Plaintiff; Right of Indemnity or Contribution**

A judgment entered in Tennessee pursuant to a trial on the merits against two tort-feasor defendants was res judicata as to the rights existing between the tort-feasor defendants in a subsequent action for contribution. *Great West Casualty Co. v. Fletcher*, 247.

**TRESPASS****§ 3. Limitation of Actions**

Plaintiff's action to recover damages for alleged trespass by a public officer under color of his office was barred by the statute of limitations. *Evans v. Chipps*, 232.

**TRIAL****§ 33.6. Inadvertent Error in Statement of Evidence**

The trial court did not err in denying plaintiff's motion for a new trial on the ground that the trial judge had misstated a fact in the charge to the jury. *Owens v. Green Valley Supply*, 561.

**§ 52. Setting Aside Verdict for Inadequate Award**

The award of a new trial on the grounds of inadequate damages was not an abuse of discretion in an action concerning the negligent construction of a fireplace. *Sullivan v. Smith*, 525.

**UNFAIR COMPETITION****§ 1. Unfair Trade Practices in General**

In an action based on an employee's discharge for seeking workers' compensation benefits, the trial court correctly dismissed the employee's claim for treble damages for defendant's alleged unfair trade practices. *Buie v. Daniel International*, 445.

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**UNIFORM COMMERCIAL CODE****§ 14. Implied Warranties; Fitness for Particular Purpose**

In an action which grew out of an explosion of a heater purchased by plaintiffs from defendant, the trial court erred in entering a directed verdict for defendants. *Arrington v. Brad Ragan, Inc.*, 416.

**§ 26. Measure of Damages for Breach of Warranty**

Under G.S. § 25-2-714(2), damages for defendant's violation of its express warranty to repair a trailer leased to plaintiff is the total payments made by plaintiff over the total value of the trailer as warranted. *Simmons v. C. W. Myers Trading Post*, 549.

**§ 32. Commercial Paper; Liability of Parties**

The evidence in an action on a note presented questions of fact for the jury as to whether the note was delivered subject to a condition precedent that plaintiff would "pursue every possible effort" to collect the sum due from a third party by prosecuting the third party for giving a worthless check in payment of the sum due and whether plaintiff had fulfilled such condition. *Northwestern Bank v. Moretz*, 710.

**UTILITIES COMMISSION****§ 22. Power to Change Rates**

The Utilities Commission erred in ordering natural gas companies to pass refunds received from their supplier to their present customers. *S. ex rel. Utilities Commission v. Public Service Co.*, 448.

**VENDOR AND PURCHASER****§ 1. Requisites and Validity of Contracts to Convey and Options**

A deed provision stating that "if this site is ever abandoned for school purposes . . . the site shall be offered for sale first to" the grantee or his heirs or assigns for a specified price created a preemptive right which was void as being in violation of the rule against perpetuities. *Peele v. Board of Education*, 555.

**WAIVER****§ 3. Pleadings, Proof and Determination**

Trial court's instructions on waiver were inconsistent with the pleadings in violation of Rule 8(c) where the plea of waiver had been stricken by court order. *Investment Trust v. Belk-Tyler*, 363.

Trial court erred in striking the defense of waiver from plaintiff's reply to defendant's counterclaim. *Ibid.*

**WITNESSES****§ 1.3. Physical Condition of Witness**

The trial court did not abuse its discretion in appointing a relative of a robbery victim to interpret the victim's testimony. *S. v. McLellan*, 101.

## WORD AND PHRASE INDEX

### ACCESS TO EVIDENCE

- Access of prisoner to mental health records, *Baugh v. Woodard*, 180.  
Disclosure of identity not required, *S. v. Simmons*, 34.  
Tests on bloodstained towels, *S. v. Hudson*, 172.

### ACCESSORIES

- After the fact to voluntary manslaughter, *S. v. Earnhardt*, 748.

### ADMISSIONS

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By nontestifying codefendant, *S. v. Howard*, 41.  
Codefendant's statement implicating defendant, *S. v. Whilwhite*, 395.  
Failure to reply to counterclaim, *Connor v. Ins. Co.*, 1.  
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### ADOPTION

- Opening of child's records improper, *Davidson v. Dept. of Social Services*, 806.

### ADULTERY

- Insufficient evidence in divorce action, *Horney v. Horney*, 725.

### AD VALOREM TAXES

- Appraisal of property based on cost approach, *In re Odum*, 412.

### ADVERSE POSSESSION

- Issue of permissive use of driveway, *Rathburn v. Hawkins*, 82.

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